ONTARIO

ASSIGNMENTS ACT,

WITH NOTES.

BY

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SECOND EDITION.

TORONTO:
THE CARSWELL CO. (LTD.) PUBLISHERS.
1896.

TORONTO
PRINTED BY THE CARSWELL CO. LTD.
22, 30 Adelaide St. East.

SECOND EDITION.

PREFATORY NOTE.

THE favour with which the first edition of this little book has been received encourages me to hope that the present edition, in which the amendments made in the recent session have been added, and some further cases noted, will be of use. The publishers have made some changes in the typographical work which will, it is expected, make it more easy to find any particular section to which it is desired to refer.

R. S. CASSELS.

TORONTO, 15TH MAY, 1896.

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ONTARIO ASSIGNMENTS ACT.

An Act respecting Assignments and Preferences by Insolvent Persons, R. S. O. (1887) Chapter 124.

Under the British North America Act the Dominion Parliament has exclusive jurisdiction in respect of the regulation of trade and commerce and in respect of bankruptcy and insolvency: B. N. A. Act, s. 91, clauses 2 and 21; while each Provincial Legislature has exclusive jurisdiction in respect of property and civil rights in the Province: s. 92, clause 13. Soon after the Assignments Act came into force, its validity was much shaken by the decision in Clarkson v. Ontario Bank, 15 A. R. 166, and after some years of doubt it was decided in Union Bank v. Neville, 21 O. R. 152, and In re Assignments and Preferences Act, 20 A. R. 489, that it was invalid. But these decisions have been overruled by the judgment of the Judicial Committee in Attorney-General of Ontario v. Attorney-General for the

Dominion of Canada, [1894] A. C. 189, and the question has been set at rest. So long, therefore, as there is no Dominion Insolvency Act in force, the present Act governs.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

1. In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor or creditors, gives a confession of judgment, cognovit actionem or warrant of attorney to confess judgment with intent, in giving such confession, cognovit actionem or warrant of attorney to confess judgment, to defeat or delay his creditors wholly or in part or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors, or over any one or more of such creditors, every such confession, cognovit actionem

or warrant of attorney to confess judgment, shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution. R. S. O. (1877) c. 118, s. 1.

The use of the disjunctive is important. Pressure is sufficient to prevent the transaction from being looked upon as a voluntary one, but even with the most direct pressure the transaction, if collusive, cannot be upheld: Martin v. McAlpine, 8 A. R. 675; Meriden Silver Co. v. Lee, 2 O. R. 451; and see the notes to the next section.

This section has been strictly construed, and it is only when the transaction in question can be properly described as the giving of a confession of judgment, cognovit actionem, or warrant of attorney to confess judgment, that it can be impeached, although its effect may be the same. Putting in a defence to one action and allowing a favoured creditor to obtain judgment by default is not conduct that comes within the section: Heaman v. Seale, 29 Gr. 278; Labatt v. Bixel, 28 Gr. 593; nor is withdrawing a defence under section 113 of the Division Courts Act, R. S. O. (1887) c. 51: Bailey v. Bank of Hamilton, 21

A. R. 156; nor is appearing and consenting to an order striking out a defence: Turner v. Lucas, 1 O. R. 623; nor is waiving the right to credit and allowing judgment to be entered by default before the period of credit expires: King v. Duncan, 29 Gr. 113; Macdonald v. Crombie, 2 O. R. 243; 10 A. R. 92; 11 S. C. R. 107; Bowerman v. Phillips, 15 A. R. 679.

By the Creditors' Relief Act, R. S. O. (1887) c. 65, priority by execution is to a great extent prevented, and a preference cannot now be easily obtained by means of an execution. In view, however, of the construction placed upon the Creditors' Relief Act in Roach v. McLachlan, 19 A. R. 496, and Breithaupt v. Marr, 20 A. R. 689, a debtor who refuses to make an assignment for the benefit of his creditors, and thus renders it impossible to bring into play the provisions of s. 9 of the Assignments and Preferences Act, may still very much prejudice the position of those creditors who are not entitled to share. It is desirable that the Creditors' Relief Act be amended so as to allow creditors whose debts are not due to share in the moneys made by the sheriff, and also to prevent subsequent execution creditors from being prejudiced by any transfer by the debtor.

The principle of the Creditors' Relief Act is thus set forth in s. 4 thereof: "In case a sheriff levies money upon an execution against the property of a debtor, he shall forthwith

enter in a book to be kept in his office, open to public inspection without charge, a notice stating that such levy has been made, and the amount thereof; and the money shall thereafter be distributed ratably, amongst all execution creditors and other creditors whose writs, or certificates given under this Act, were in the sheriff's hands at the time of the levy, or who shall deliver their writs or certificates to the said sheriff within one month from the entry of notice."

The certificates referred to are certificates of indebtedness in the nature of judgments, and a summary mode of procedure for obtaining them is provided by the Act. Provision is also made for the distribution of dividend sheets and the contestation of claims, and the payment of costs and dividends, so that under the Act there is practically an administration by the sheriff in favour of a limited class.

2. (1) Subject to the provisions of the third section of this Act, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or

personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, shall as against the creditor or creditors injured, delayed or prejudiced be utterly void.

(2) Subject also to the said provisions of the third section of this Act every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, or securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, to or for a creditor with intent to give such creditor an unjust preference over his other creditors or over any one or more

of them, shall, as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

(*a*) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

(*b*) Subject to the provisions of section 3 aforesaid, if such transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within

sixty days after the transaction makes an assignment for the benefit of his creditors, be presumed to have been made with the intent aforesaid, and to be an unjust preference within the meaning hereof, whether the same be made voluntarily or under pressure.

This composite section was in the session of 1891, by 54 V. c. 20, substituted for section 2 of R. S. O. (1887) c. 124. That section was as follows:

"Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one, or more of them, or which has such effect, shall, as against them, be utterly void."

Before the year 1885, when this section was passed, it was necessary, in order to have a transaction set aside as a preference, to

show not only an intent by the debtor to give a preference but also a concurrence in that intent on the part of the creditor, and, by what was known as the doctrine of pressure, if it were shown that the debtor was not acting purely voluntarily but under some influence or threat, exercised or made in good faith by the creditor, or under fear of penal consequences, any presumption of such intent was rebutted. The result was that only the plainest cases of fraudulent preference could be successfully attacked, for almost any request or demand by the creditor was sufficient to prevent the transaction from being regarded as a purely voluntary one: Brayley v. Ellis, 1 O. R. 119; 9 A. R. 565; Totten v. Bowen, 8 A. R. 602; In re Hurst, 6 P. R. 329; Whitney v. Toby, 6 O. R. 54; Slater v. Oliver, 7 O. R. 158; Meriden Silver Co. v. Lee, 2 O. R. 451; Powell v. Calder, 8 O. R. 505; Ivey v. Knox, 8 O. R. 635; Long v. Hancock, 12 A. R. 137; 12 S. C. R. 532; and see Stephens v. McArthur, 19 S. C. R. 446; Molsons Bank v. Halter, 18 S. C. R. 88. And it was also settled that the bona fide belief of the debtor that by giving security and getting an extension he would pull through negatived any inference of intent: Long v. Hancock, 12 S. C. R. 532.

After some difference of opinion it was for a time settled that under the amendment of the year 1885 it was only necessary, in order to have a transaction set aside, to show that it was entered into while the debtor was

in insolvent circumstances, and that by means of it the creditor obtained a preference. In Johnson v. Hope, 17 A. R. 10, and Ashley v. Brown, 17 A. R. 500, the Court of Appeal held, however, that knowledge by the creditor, at the time of entering into the transaction, of the insolvent condition of the debtor must also be proved, and that dealings in good faith with an embarrassed debtor were not within the mischief of the Act. This weakening of the construction of the section was shortly afterwards carried still further by the Supreme Court of Canada, who held that the Ontario Act (and the Manitoba Act of similar import) applied only to voluntary preferences, and that pressure was still effectual to rebut any presumption of fraudulent intent: Molsons Bank v. Halter, 18 S. C. R. 88; Gibbons v. McDonald, 20 S. C. R. 587; even if there was actual knowledge of the insolvent condition of the debtor: Stephens v. McArthur, 19 S. C. R. 446; Hickerson v. Parrington, 18 A. R. 635; Davies v. Gillard, 21 O. R. 431; 19 A. R. 432; so that the law was practically brought back to what it was before the year 1885.

The construction of the present more complicated section has not yet been satisfactorily settled, but it is doubtful if it effects any marked change in the law. It certainly leaves transactions entered into before the sixty days' limit as little open to attack as under the former section, and as far as clause 2 is concerned the use of the adjective "un-

just," may perhaps make an attack even less likely to succeed than before; though it has been said that there is no practical difference between the expressions "unjust preference" and "preference": Ivey v. Knox, 8 O. R. 635; Robinson v. Cook, 6 O. R. 590; and see Davidson v. Ross, 24 Gr. 22. In this clause also transactions entered into "for a creditor" are included, but, except in this respect, the clause carries the rights of creditors no further.

In Cole v. Porteous, 19 A. R. 111, Osler, J.A., in a Division Court appeal, held that a preferential security given by an insolvent debtor to his creditor could not be supported if attacked within sixty days. In Lawson v. McGeoch, 20 A. R. 464, however, the other Judges of the Court of Appeal took a different view: Hagarty, C.J.O., and Burton, J.A., held that the presumption of intent spoken of was a rebuttable presumption, and that the secured creditor's good faith and want of knowledge of the insolvent condition of the debtor were sufficient to rebut the presumption. Maclennan, J.A., held that the presumption could not be rebutted by showing pressure. The result of this decision seems to be that in cases within the clauses a limited shifting of the onus of proof has been effected. But it is at least doubtful if even this is not going too far. The clauses say that under the circumstances stated the transaction shall be presumed to have been made with intent. But

before the clauses were passed, to render a security impeachable, concurrence in the intent had to be shown, and nothing is said as to a presumption of concurrence. See, however, Meharg v. Lumbers, 23 A. R. 51, and Clarkson v. Ellis, Divisional Court, 15th May, 1896.

An interpleader issue is a "proceeding" within sub-section (a): Cole v. Porteous, 19 A. R. 111.

If a definite, clearly proved agreement to give security is entered into before the sixty days, the transaction is taken out of the clauses in question: Lawson v. McGeoch, 20 A. R. 464; Embury v. West, 15 A. R. 357; Clarkson v. Sterling, 15 A. R. 234; Goulding v. Deeming, 15 O. R. 201; McRoberts v. Steinoff, 11 O. R. 369; Smith v. Fair, 11 A. R. 755; Kerry v. James, 21 A. R. 338; Brayley v. Ellis, 1 O. R. 119; Robins v. Clark, 45 U. C. R. 362; Stuart v. Thomson, 23 O. R. 503; Boustead v. Shaw, 27 Gr. 280.

This dangerous doctrine of relation back needs to be kept within strict limits. A mere general promise will not be enough, nor can the advantage be gained if taking security is deliberately postponed in order to avoid possible injury to the debtor's credit: Ex parte Fisher, L. R. 7 Ch. 636; or if registration is postponed for that purpose: Clarkson v. McMaster, 25 S. C. R. 96. In Morris v. Morris, [1895] A. C. 625, however, non-registration of a chattel mortgage because of the money

lender's dislike to appear publicly in that capacity was held not to be a badge of fraud. Now that taking possession under an unregistered chattel mortgage is of no avail there is little danger of non-registration of such an instrument, and by 59 V. c. 34, an attempt has been made to do away with agreements for bills of sale and chattel mortgages. An assignee for the benefit of creditors is not in terms entitled to take advantage of the Act, but, assuming that as representative of the creditors he can do so, its scope is limited, and antecedent agreements for security by any other mode than a bill of sale or chattel mortgage may still be set up as a defence. See Clarkson v. Ellis, Divisional Court, 15th May, 1896.

"Insolvent circumstances," and "unable to pay his debts in full," are co-extensive expressions, and what has to be shown is not a state of insolvency in the strict legal or commercial acceptation of the term, but the debtor's inability to pay his way and meet the demands of his creditors, and his want of means to pay them in full out of his assets realized upon a sale for cash or its equivalent: Warnock v. Kloepfer, 15 A. R. 324; 18 S. C. R. 701; Clarkson v. Sterling, 15 A. R. 234; Dominion Bank v. Cowan, 14 O. R. 465; Rae v. Macdonald, 13 O. R. 352. See, however, Stuart v. Thomson, 23 O. R. 503, at p. 512.

Knowledge of the insolvent condition may be implied if knowledge is shown of circum-

stances from which ordinary men of business would conclude that the debtor was unable to meet his liabilities: National Bank of Australasia v. Morris, [1892] A. C. 287.

In Hope v. Grant, 20 O. R. 623, it was held that the accommodation indorser of a note not due was not a creditor of the maker, and that security given to him could not be attacked. It was thereupon enacted by 55 V. c. 25, that "where the word 'creditor' occurs in the ninth line of subsection 2 of section 2, of the Act respecting Assignments and Preferences by Insolvent Persons, as the said Act is amended by the Act passed in the 54th year of Her Majesty's reign chaptered 20, and in the second and third lines of clause (a) of said subsection and in the second and third lines of clause (b) of said subsection, the same shall be deemed to include any surety and the indorser of any promissory note or bill of exchange, who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into or such indorsement given become a creditor of the person giving the preference within the meaning of said subsection 2." But a person who takes or agrees to receive security contemporaneously with giving his indorsement is not within the section: Kerry v. James, 21 A. R. 338.

The right of attack is limited to creditors, or to an assignee for the benefit of creditors,

and the Act is thus narrower than the statute of Elizabeth: Oliver v. McLaughlin, 24 O. R. 41. A man who has a pending claim for damages for tort cannot attack a transaction entered into before his claim is ascertained by judgment: Ashley v. Brown, 17 A. R. 500; Cameron v. Cusack, 17 A. R. 489; Gurofski v. Harris, 27 O. R. 201.

And an attack can be made only when the person preferred is a creditor. If it is only in respect of the impeached transaction that the person becomes a creditor at all the security cannot be set aside: Kerry v. James, 21 A. R. 338; Robins v. Clark, 45 U. C. R. 362. Security given to a co-trustee to secure the repayment of misapplied trust funds cannot be set aside: Molsons Bank v. Halter, 18 S. C. R. 88.

The effect of the transaction is not evidence of the intent: Randall v. Dopp, 22 O. R. 422; Carr v. Corfield, 20 O. R. 218. The intent is a question of fact, upon which the finding of the Judge at the trial is in general conclusive: Randall v. Dopp, 22 O. R. 422; Clarkson v. McMaster, 22 A. R. 138; but the evidence of the parties to the impeached transaction should be acted upon with caution: Morton v. Nihan, 5 A. R. 20; Merchants' Bank v. Clarke, 18 Gr. 594; though if believed it is sufficient: Jack v. Greig, 27 Gr. 6.

Book debts are a species of property that come within the Act, and an assignment of

book debts, if it is a preference, may be set aside: Warnock v. Kloepfer, 15 A. R. 324; 18 S. C. R. 701; Labatt v. Bixel, 28 Gr. 593, and such an assignment does not require registration under the Bills of Sale Act: Thibaudeau v. Paul, 26 O. R. 385.

Book debts that may hereafter accrue due, or property that may hereafter be acquired, may be assigned as security: Tailby v. Official Receiver, 13 App. Cas. 523; Horsfall v. Boisseau, 21 A. R. 663; Banks v. Robinson, 15 O. R. 618; Wellbanks v. Heney, 19 O. R. 549; Coyne v. Lee, 14 A. R. 503; Re Thirkell, Perrin v. Wood, 21 Gr. 492; Suter v. Merchants' Bank, 24 Gr. 365; Kitching v. Hicks, 6 O. R. 739; McAllister v. Forsyth, 12 S. C. R. 1.

An assignment of insurance policies may be set aside: Ivey v. Knox, 8 O. R. 635.

A lease by a debtor to his creditor, the debt being paid by the rent, is not a preference: Smith v. Lawrence, 27 C. L. J. 116; nor is the taking of possession by a chattel mortgagee under a mortgage void as against creditors owing to non-compliance with the technical requirments of the Chattel Mortgage Act: Bank of Hamilton v. Tamblyn, 16 O. R. 247; nor is supplying materials under an agreement that the property in them is not to pass: Wellbanks v. Heney, 19 O. R. 549; nor is payment by the debtor to a creditor for the express purpose of reviving a statute-barred debt: In re Lane, 23

Q. B. D. 74. See, however, Finch v. Gilray, 16 A. R. 484, as to the impossibility of reviving to the prejudice of creditors the title to real estate.

If there are two mortgages on the same property, and the first is set aside as a preference, this enures to the benefit of the second mortgagee, subject to the payment of the costs of the action: Coursolles v. Fookes, 16 O. R. 691; Sanguinetti v. Stuckey's Banking Company, [1895] 1 Ch. 176; In re Farnham, [1895] 2 Ch. 799.

One partner may take in his own name security for a partnership debt: Hobbs Hardware Co. v. Kitchen, 17 O. R. 363.

"Void" in Acts of this kind means "voidable": Meriden Britannia Company v. Braden, 21 A. R. 352; and it would seem that a good title can be conferred by a person who holds under what is under the Act a void title: In re Vansittart, [1893] 2 Q. B. 377; In re Brall, [1893] 2 Q. B. 381; though in Cameron v. Perrin, 14 A. R. 565, it is suggested that the wording of the Act is definite enough to avoid even inter partes a fraudulent transaction. And see Clarkson v. McMaster, 25 S. C. R. 96; Meharg v. Lumbers, 23 A. R. 51, at p. 60.

A security may be upheld in part and set aside in part: Mader v. McKinnon, 21 S. C. R. 645; Kitching v. Hicks, 6 O. R. 739. But in Cameron v. Perrin, 14 A. R. 565, where there was a sale of goods and a mortgage was given

upon these goods and other goods with the intent, as far as the other goods were concerned, to protect them from creditors, the mortgage was set aside in toto, and all the goods were held to be subject to an execution against the purchaser.

A creditor who has knowingly accepted the benefit of a transaction cannot afterwards impeach it; he cannot take the benefit of the consideration for a transfer and then set the transfer aside: Beemer v. Oliver, 10 A. R. 656; Wood v. Reesor, 22 A. R. 57.

The amending Act of 1891 contained a provision that it should not affect any pending action, suit, or proceeding. This provision was inserted ex majore cautelâ, for such an amendment is not retroactive: Ormsby v. Jarvis, 22 O. R. 11; Coats v. Kelly, 15 A. R. 81; Clarkson v. Ontario Bank, 15 A. R. 166; Clarkson v. Sterling, 15 A. R. 234.

In addition to the civil right of attack upon fraudulent preferences given by this section, the aid of the criminal law may be invoked by defrauded creditors. The Criminal Code, s. 368, provides that "every one is guilty of an indictable offence and liable to a fine of $800 and to one year's imprisonment who, (a) with intent to defraud his creditors, or any of them, (1) makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property; (2) removes, conceals or dis-

poses of any of his property; or (b) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property."

In Regina v. Henry, 21 O. R. 113, it was held that creditors whose claims are not due may take advantage of this section, and this provision may thus be of great use in cases where civil proceedings cannot be advantageously taken.

Section 369 of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document," might also be sometimes invoked with advantage.

3. (1) Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or to another assignee, resident within the Province of Ontario, with the consent of the creditors as hereinafter provided, for the purpose of paying ratably and proportionately and without preference or priority

all the creditors of the debtor their just debts; nor to any *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; nor to any payment of money to a creditor, nor to any *bona fide* gift, conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as above mentioned, which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of goods or other property; provided that the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

(*a*) In case of a valid sale of goods, securities or property, and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor, under circumstances which would

render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, shall be void as respects the creditor to whom the same is made. 48 V. c. 26, s. 3, (1); 50 V. c. 19, ss. 1, 2.

(2) Every assignment for the general benefit of creditors, which is not void under section 2 of this Act, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in conformity with this Act, and shall be subject in other respects to the provisions of this Act until and unless a subsequent assignment is executed in accordance with this Act.

(*a*) Every assignment hereafter executed for the general benefit of creditors, whether the assignment is or is not expressed to be made under or in pursuance

of the Act respecting Assignments and Preferences by Insolvent Persons, and whether the debtor has or has not included all his real estate and personal estate, shall vest the estate, whether real or personal or part real and part personal, thereby assigned in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of the said Act and the Acts amending the same, and the provisions of the said Act and amending Acts shall apply to the assignee named thereunder: 58 V. c. 23, s. 5.

(3) In case a payment has been made which is void under this Act, and any valuable security was given up in consideration of the payment, the creditor shall be entitled to have the security restored, or its value made good to him before, or as a condition of, the return of the payment. 50 V. c. 19, s. 3.

(4) Nothing herein contained is to affect the Act respecting wages, or to prevent a debtor providing for payment of wages due by him in accordance with the provisions of the said Act. Nor shall anything herein contained affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor, nor to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors. Nor shall anything herein contained invalidate a security given to a creditor for a pre-existing debt where by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade

or business, and to pay his debts in full. 48 V. c. 26, s. 3, (2); 49 V. c. 25, s. 1; 54 V. c. 20, s. 2.

(5) The debtor may in the first place with the consent of a majority of his creditors having claims of $100 and upwards computed according to the provisions of section 19, make a general assignment for the benefit of his creditors, to some person other than the sheriff and residing in this Province. 48 V. c. 26, s. 3, (4); 50 V. c. 19, s. 4.

(6) No person other than a permanent and *bona fide* resident of this Province shall have power to act as assignee under an assignment within the provisions of this Act, nor shall any such assignee have power to appoint a deputy or to delegate his duties as assignee to any person who is not a permanent and *bona fide* resident of this Province; and no charge shall be made or recoverable against the assignor or his estate for any services or other

expenses of any such assignee, deputy or delegate of any assignee who is not a permanent and *bona fide* resident of this Province as aforesaid. 52 V. c. 21, s. 1.

(*a*) The property and assets of any such estate shall not be removed out of the Province without the order of the County Court Judge of the County in which the assignment is registered, and the proceeds of the sale and all moneys received on account of any estate shall be deposited by the assignee in one of the incorporated banks within this Province, and shall not be withdrawn or removed without the order of such County Court Judge, except in payment of dividends and other charges incidental to the winding up of the estate, and any assignee or other person acting in his stead or on his behalf violating the provisions of this section shall be liable to a penalty of $500, which may be recovered summarily before a Judge of the High Court or of the County Court of the County in which the assignment is by the

said Act required to be registered; and one-half of the said penalty shall go to the person suing therefor, and the other half shall belong to the estate of the assignor; but in default of payment of the said penalty and all costs which may be incurred in any action or proceeding for the recovery thereof such assignee or other person may be imprisoned for any period not exceeding thirty days, and shall be disqualified from acting as assignee of any estate while such default continues. 52 V. c. 21, s. 2.

Clause (1) of this section is an amplification of the saving exception of R. S. O. (1877) c. 118, s. 2, and the decisions under that section would to some extent afford a guide to the construction of the present section. An assignment to be protected must be made in good faith for the general benefit of creditors, and any attempt to impose unreasonable terms upon the creditors or to retain a benefit for the debtor against their will, would render it invalid: Whitman v. Union Bank of Halifax, 16 S. C. R. 410; Spencer v. Slater, 4 Q. B. D. 13; Jennings v. Hyman, 11 O. R. 65. The accidental omission of a creditor's name from a schedule of creditors referred to in an assign-

ment will not invalidate the assignment, nor deprive the omitted creditor of his right to share: McLean v. Garland, 13 S. C. R. 366. The assignee may within reasonable limits be empowered to carry on the business of the debtor if it can be better disposed of as a going concern, and to sell on credit: O'Brien v. Clarkson, 10 A. R. 603; Jennings v. Moss, 10 A. R. 696; Slater v. Badenach, 10 S. C. R. 296; Ontario Bank v. Lamont, 6 O. R. 147; but it was well even in the so-called "common law" assignments not to include too definite directions as to the trustee's duties, and it is certainly advisable to now follow the statutory directions and the statutory directions only.

A creditor who accepts payment of a dividend cannot attack the assignment: Beemer v. Oliver, 10 A. R. 656; nor can a creditor do so who attends a meeting of creditors, assents to his own appointment as inspector, and acts as such: Gardner v. Kloepfer, 7 O. R. 603; but after an unsuccessful attack he may come in under the assignment and rank for his claim: Kloepfer v. Gardner, 10 O. R. 415; 14 A. R. 60; 15 S. C. R. 390.

An assignment under the Act is voluntary in the sense that it is optional on the part of the assignor whether to make it or not, but once made its effect cannot be controlled: Re Unitt and Prott, 23 O. R. 78.

A sale in good faith of a business as a whole to a creditor who cancels his debt as

part of the price is valid, the section not being limited to sales over the counter: Clarkson v. Rothwell, per Boyd, C. (unreported, but noted 11 C. L. T. 67); and in the absence of mala fides there is nothing to prevent a creditor from buying goods from his debtor and deducting his debt from the purchase money: Lewis v. Brown, 10 A. R. 639; and it would seem that a mortgagee can retain as against an assignee surplus proceeds of sale in satisfaction of an unsecured debt: Stephens v. Boisseau, 23 A. R. 230.

Under the Act as originally passed a payment of money to a creditor was, under certain circumstances, void as against an assignee, but the prohibitive provisions were afterwards struck out, so that now money may be paid to a creditor at any time. It would seem, too, that under sub-section 1 payment "in kind" to an "innocent" creditor would be protected: Re Bond, 16 N. S. W. Rep. (Bkcy.) 74.

It has been held that handing to a creditor the unaccepted cheque of a third person who at the time has funds at his credit to meet it is a payment of money within the meaning of this section: Armstrong v. Hemstreet, 22 O. R. 336; but this case has been overruled by Davidson v. Fraser, Court of Appeal, 12th May, 1896. Where a debtor, at his brother's instance, sells his stock to a bona fide purchaser and pays the proceeds to the holder of his notes en-

dorsed by his brother, that is also a payment that cannot be impeached: Harvey v. McNaughton, 10 A. R. 616. So the substitution of the purchaser's notes for the vendor's notes in the hands of a banker is also a payment: Building and Loan Association v. Palmer, 12 O. R. 1.

Where the creditor made an advance equal to the amount of his claim upon the faith of the debtor's statement that this advance would enable him to pay off all his other creditors, security taken for the old indebtedness and the new advance was upheld: Hyman v. Cuthbertson, 10 O. R. 443; but the smallness of the new advance is strong evidence that the true object was to secure the old debt: Ex parte Fisher, L. R. 7 Ch. 636; and it is not an advance to pay off other claims at the debtor's request, taking security for the amount so paid and for the original debt: Boyd v. Glass, 8 A. R. 632; and the true nature and not the form of the transaction must be looked at: In re Watson, 25 Q. B. D. 27; Madell v. Thomas, [1891] 1 Q. B. 230. The new advance may be made in goods: Ex parte Sheen, 1 Ch. D. 560; Goulding v. Deeming, 15 O. R. 201.

Security given to a person who makes an actual advance of money to an insolvent is valid, even though the insolvent pays the money to a favoured creditor, for the lender is not concerned with what the borrower does

with the proceeds of the loan: Campbell v. Patterson, 21 S. C. R. 645; Gibbons v. Wilson, 17 A. R. 1; Court v. Holland, 4 O. R. 688; Ex parte Stubbins, 17 Ch. D. 58; Darvill v. Terry, 6 H. & N. 807. And see Meriden Britannia Co. v. Braden, 21 A. R. 352.

"Bona fide," or "in good faith," means without notice that any fraud or fraudulent preference is intended: Butcher v. Stead, L. R. 7 H. L. 839; and good faith on the part of the purchaser is sufficient; it is not necessary that both parties should act in good faith: Mackintosh v. Pogose, [1895] 1 Ch. 505.

"Fair and reasonable relative value" is a question of fact in each case: Cameron v. Perrin, 14 A. R. 565.

An assignment to a person other than the sheriff and without the consent of creditors is valid, but will be superseded by a subsequent assignment executed with such consent: Anderson v. Glass, 16 O. R. 592; and the consent of the creditors need not be obtained at the time the assignment is made, but may be obtained subsequently: Hall v. Fortye, 17 O. R. 435. Apart from the Act, without the assent, or at least the knowledge, of a creditor, an assignment was revocable: Cooper v. Dixon, 10 A. R. 50; but where an assignment has been acted upon by the creditors it is not open to the objection, even if made by an execution creditor, that no creditor executed it: Ball v. Tennant, 25 O. R. 50.

An assignment confined in terms to personal property only was held not to be within the Act: Blain v. Peaker, 18 O. R. 109; and the principle of this case was carried further in subsequent cases in which it was held that excepting from the assignment the assignor's book debts to even a small amount took it out of the Act. This was perhaps not giving full effect to clause 2 of this section; but however that may be clause 2 (a) was added by 58 V. c. 23, to overcome this difficulty, and to prevent advantage being taken of this non-statutory form of assignment.

The Act respecting Wages is R. S. O. (1887) c. 127. It provides (section 1) that "whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to the claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of the making of such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary or general creditors for the residue, if any, of their claims," and (section 4) the Act is to apply to wages or salary "whether the employment in respect of which the same shall be payable, be, by the day, by the week, by the job or piece or otherwise." Under the Insolvent Act of 1875 (section 91) "clerks and other persons in the employ of

the insolvent" were given priority to a certain extent, but the decisions placed a narrow construction on the words. Under the similar provisions of the Winding-up Act [R. S. C. c. 129, s. 56 (2)] it has recently been held that an auditor is not entitled to priority: In re Ontario Forge and Bolt Co., 27 O. R. 230; but the provisions of the Wages Act are much wider. See Welch v. Ellis, 22 A. R. 255. The limitation as to the time of employment must, however, be strictly observed: Ex parte Napier, 3 Pugsley 134.

Clauses (6) and (6a) were added by 52 V. c. 21, and do not apply to any assignment executed before the 23rd of March, 1889. It is to be feared that the provisions of clause (6a) are not very generally observed, and it might be well to test the validity of the section, in so far as it imposes a criminal liability for its breach, by proceedings against some of the offenders. See Regina v. Wason, 17 A. R. 221.

Where an assignment is made to a person resident in this province, but the estate is managed and wound up by that person's partner, resident in Montreal, commission cannot be recovered by the assignee: Tennant v. Macewan, Robertson, J., 7th April, 1896.

4. Every assignment made under this Act, for the general benefit of creditors

shall be valid and sufficient if it is in the words following, that is to say—all my personal property which may be seized and sold under execution and all my real estate, credits and effects, or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure, or sale under execution, subject, however, as regards lands, to the provisions of the registry law as to the registration of the assignment. 48 V. c. 26, s. 4.

The form of assignment in common use is as follows :

This indenture, made the day of in the year of our Lord one thousand eight hundred and ninety pursuant to the Revised Statutes of Ontario, 1887, chapter one hundred and twenty-four, intituled an Act respecting Assignments and Preferences by Insolvent Persons, and under every other Law

and Statute applicable to Assignments and Conveyances of Real and Personal Property.

Between the "Debtor," of the first part, the "Assignee," of the second part, and the several firms, persons and corporations who are creditors of the Debtor, hereinafter called the "Creditors," of the third part.

Whereas the Debtor hath heretofore carried on business at as and being unable to pay his creditors in full, hath agreed to convey and assign to the Assignee all his estate, real and personal, for the purpose of paying and satisfying the claims of his creditors ratably and proportionately, and without preference or priority.

Now this indenture witnesseth that in consideration of the premises and of the sum of one dollar, the Debtor doth hereby grant and assign to the Assignee, his heirs, executors, administrators and assigns, all his personal property which may be seized and sold under execution, and all his real estate, credits and effects.

To have and to hold the same unto the Assignee, his heirs, executors, administrators and assigns, respectively, according to the tenure of the same.

Upon trust that the Assignee, his heirs, executors, administrators and assigns, shall sell and convey the real and personal estate and convert the same into money, and collect

and call in the debts, dues and demands of the debtor.

And it is hereby declared that the assignee, his heirs, executors, administrators and assigns, shall stand possessed of the moneys derived from the sale of the real and personal estate, and the moneys collected and called in and all other moneys which the Assignee, his heirs, executors, administrators and assigns shall receive for or on account of the premises hereinbefore assigned, upon trust, in the first place, to pay the costs of and incidental to the preparation and execution of these presents; secondly, to deduct and retain such remuneration as shall be voted or fixed for the Assignee under the provisions of the said Act; and, thirdly, to pay the debts and liabilities of the Debtor to the Creditors, respectively, ratably and proportionately and without preference or priority, and the surplus, after payment of all claims, costs, charges and expenses in full, to hand over to the Debtor.

The Debtor appoints the Assignee, his heirs, executors, administrators and assigns, his lawful attorney irrevocable in his name to do all matters and things, make, sign, seal and execute all deeds, documents and papers necessary to more fully perfect in him the title to the lands, premises, goods and chattels, debts, dues and demands hereby assigned or intended so to be, and to do all other acts,

matters and things necessary to enable the Assignee to carry into effect these presents.

And it is hereby declared that if it shall be in the interest of the Creditors so to do the Assignee may sell the book debts or any portion thereof either by public auction or private contract.

And the Creditors hereby assent to this assignment.

In witness whereof, etc.

Such a statutory assignment would have no extra territorial effect: Macdonald v. Georgian Bay Lumber Co., 2 S. C. R. 364, nor will it pass an interest in the funds of a benefit society, which creditors cannot get at in invitum: Re Unitt and Prott, 23 O. R. 78; nor the benefit of a covenant to indemnify the assignor against payment of a mortgage: Ball v. Tennant, 21 A. R. 602.

A company incorporated under the Joint Stock Companies' Letters Patent Act may make an assignment, and this may be done under the authority of the directors without consultation with the shareholders: Whiting v. Hovey, 13 A. R. 7; 14 S. C. R. 515; and where an assignment has been made by a company with the approval of the majority of its creditors the court will, in the exercise of its discretion, refuse to make a winding-up order: Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107. An assignment may be made by a firm, but one partner cannot

assign the firm assets without the consent of his co-partner, and in practice it is always advisable to have such an assignment executed by one of the partners in the firm name, and also by all the partners in their individual names: Nolan v. Donnelly, 4 O. R. 440; Nelles v. Maltby, 5 O. R. 263; Cameron v. Stevenson, 12 C. P. 389. An assignment made by a firm in which there is an infant partner will not pass the infant's interest: Powell v. Calder, 8 O. R. 505; and see Lovell v. Beauchamp, [1894] A. C. 607.

An assignment executed in their individual names, by partners in a firm, purporting to assign "all their estate," etc., conveys the separate estate of each partner, as well as the partnership estate: Nelles v. Maltby, 5 O. R. 263; Ball v. Tennant, 25 O. R. 50; 21 A. R. 602.

The words "exempt from seizure or sale under execution" refer to the exemptions under R. S. O. (1887) c. 64: Re Unitt and Prott, 23 O. R. 78, the provisions of which are as follows:

"2. The following chattels are hereby declared exempt from seizure under any writ, in respect of which this Province has legislative authority, issued out of any Court whatever in this Province, namely:

(1) The bed, bedding and bedsteads (including a cradle), in ordinary use by the debtor and his family;

(2) The necessary and ordinary wearing apparel of the debtor and his family;

(3) One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking-glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve teacups, twelve saucers, one sugar basin, one milk jug, one teapot, twelve spoons, two pails, one washtub, one scrubbing brush, one blacking brush, one washboard, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated, not exceeding in value the sum of $150;

(4) All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of $40;

(5) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of

$75, and food therefor for thirty days, and one dog;

(6) Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of $100;

(7) Bees reared and kept in hives to the extent of fifteen hives.

3. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in subdivision 6 of section 2 of this Act, elect to receive the proceeds of the sale thereof up to $100, in which case the officer executing the writ shall pay the net proceeds of such sale if the same shall not exceed $100, or, if the same shall exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor."

The debtor can do what he likes with these exemptions or their proceeds: Temperance Insurance Co. v. Coombe, 28 C. L. J. 88; Field v. Hart, 22 A. R. 449; and a judgment creditor cannot attach money payable in respect of insurance upon them: Osler v. Muter, 19 A. R. 94. As to chattels "ordinarily used" in the debtor's occupation, see Wright v. Hollingshead, 23 A. R. 1.

Rights of action vest in the assignee. If, however, an action by the debtor is pending

at the time of the assignment, the action abates and must be revived. If it is not revived the defendant should move for an order that it be revived or dismissed: Cameron v. Eager, 6 P. R. 117. If the action is revived by the assignee he becomes liable for the costs. An assignee is not examinable as a transferee of a judgment debtor: British Canadian Loan and Investment Co. v. Britnell, 13 P. R. 310; but employees of the assignor can be examined: Canadian Bank of Commerce v. Wall, 11 C. L. T. Occ. N. 201.

Composition agreements sometimes contain a provision that on default in payment a named person may execute an assignment for the benefit of creditors as attorney for the debtor. This would appear to be proper: Furnivall v. Hudson, [1893] 1 Ch. 335.

If a man purchases land which is subject to a mortgage and then makes an assignment for the benefit of his creditors the equity of redemption passes to the assignee free from any claim for dower of the assignor's wife: Gardner v. Brown, 19 O. R. 202. If, however, the land is unincumbered, or if the incumbrance has been created by the assignor, the inchoate right of dower of his wife is not affected by the assignment for the benefit of creditors, and a release of dower should be obtained.

The assignee or his agent cannot sell the stock-in-trade of the estate by auction in a municipality where there is a by-law against

persons acting as auctioneers without license: Regina v. Rawson, 22 O. R. 467. And see Merritt v. Toronto , 22 A. R. 205.

If the assigning debtor owns any lands or any interest in any lands the assignment should at once be registered in the registry office of the division in which the lands are situate. If not, the debtor may, notwithstanding the assignment, convey the lands or his interest to a bona fide purchaser, who may thus gain priority over the assignee.

5. If any assignor or assignors executing an assignment under this Act for the general benefit of his or their creditors owes or owe, debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full. 48 V. c. 26, s. 5.

The rule of distribution laid down is that adopted in the administration of estates in insolvency, and under certain circumstances in their administration by the Court of Chan-

cery. The subject is fully discussed in Robson's Law of Bankruptcy, 7th ed., p. 690, et seq., p. 717, et seq. And see Bank of Toronto v. Hall, 6 O. R. 644, 653; Martin v. Evans, 6 O. R. 238; Re McDonagh v. Jephson, 16 A. R. 107.

Under a similar provision in the old Insolvent Acts it has been held that the doctrine of "double proof" applies where the joint and separate estates are being concurrently administered, so that a creditor holding a note made by the firm and indorsed by a partner can rank against only one estate: In re Chaffey, 30 U. C. R. 64. See also Re Baker, 3 Ch. Ch. 499; Ontario Bank v. Chaplin, 20 S. C. R. 152.

A solvent partner may prove against the estate of an insolvent partner for the amount paid by the former in excess of his share: In re Head, [1894] 1 Q. B. 638; and as to proof between partners, see Robson's Law of Bankruptcy, 7th ed., p. 731, et seq.

The section does not apply unless there is an administration of separate estate and joint estate, so that creditors having claims against an assignor as a partner in a former firm are entitled to rank pari passu with his subsequent creditors: Macdonald v. Balfour, 20 A. R. 404; Moorehouse v. Bostwick, 11 A. R. 76. But where goods are sold to a person who afterwards forms a partnership and brings the goods in as part of the partnership stock the

vendor cannot rank against the partnership: In re Simmons, 20 L. C. Jur. 296.

6. (1) A majority in number and value of the creditors who have proved claims to the amount of $100 or upwards, may at their discretion substitute for the sheriff or for an assignee under an assignment to which sub-section 2 of section 3 of this Act applies, a person residing in the county in which the debtor resided, or carried on business at the time of the assignment. An assignee may also be removed, and another assignee may be substituted, or an additional assignee may be appointed by a Judge of the High Court, or of the County Court where the assignment is registered. 48 V. c. 26, s. 6; 53 V. c. 34.

(2) Where a new assignee is appointed the estate shall forthwith vest in him without a conveyance or transfer. The new assignee may register an affidavit of his appointment in the office in which the

original assignment was filed, such an affidavit may also be registered under the Registry Act. The registration of the affidavit under the Registry Act shall have the same effect as the registration of a conveyance. 49 V. c. 25, s. 4.

Before the amendment made in 1890 an assignee could be removed only by the court upon special application, and a strong case of unfitness or misconduct had to be made out. The creditors now have the matter in their own hands, as to the removal, though the area from which the new assignee may be chosen is limited. Only creditors who have proved claims can vote on a motion to change the assignee, and by section 20 (1) when a claim is proved "such vouchers as the nature of the case admits of" must be furnished. There must be also a majority in number as well as in value in favour of the change. Upon other questions a creditor may vote without proving his claim unless his vote is disputed: section 18.

If an assignee dies a new assignee may be appointed under this section: In re Hagar, Boyd, C., 11th March, 1895.

The same person cannot act as assignee and solicitor of the estate: Re Dickinson, 2 B. C. Rep. 262; and if the assignee has inter-

ests adverse to those of the creditors a new assignee will be appointed: Re Canning, Rose, J., 24th April, 1896.

If an assignment is made to the sheriff he is not, if he sells land by auction, in the same position as if he were selling under an execution, and is not the agent of a person who bids: McIntyre v. Faubert, 26 O. R. 427.

7. (1) Save as provided in the next succeeding sub-section the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of this Act.

(2) If at any time any creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the trustee under the authority of the creditors or inspectors, refuses or neglects to take such proceeding, after being duly required so to do, the creditor shall have the right to obtain an order of the Judge authorizing him to take the proceedings in the name of the trustee,

but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee, as the Judge may prescribe, and thereupon any benefit derived from the proceedings shall belong exclusively to the creditor instituting the same for his benefit, but if, before such order is granted, the assignee shall signify to the Judge, his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceeding, if instituted within such time, shall appertain to the estate. 48 V. c. 26, s. 7.

If a creditor, before the assignment, begins proceedings to set aside a fraudulent transaction, the subsequent assignment does not put an end to them, but the assignee may be joined as a party plaintiff or an order obtained by the creditor allowing him to sue for his own benefit: Gage v. Douglas, 14 P. R. 126; and if such an order is obtained the action brought must be such as comes within its terms: Campbell v. Hally, 22 A. R. 217. Be-

fore the assignee can be joined as plaintiff his consent in writing must be obtained: Bank of London v. Wallace, 13 P. R. 176, and the assignee, even if financially worthless, should not be ordered to give security for costs: Vars v. Gould, 8 P. R. 31; Major v. Mackenzie, 17 P. R. 18. He is, however, personally liable for the costs of litigation to which he is a party: Macdonald v. Balfour, 20 A. R. 404; Buchanan v. Smith, 17 Gr. 208; 18 Gr. 41; Smith v. Williamson, 13 P. R. 126; with a right of indemnity out of the estate if the question is one that it is proper to raise in the interests of the creditors: Yale v. Tollerton, 2 Ch. Ch. 49. But there must be no waste of the assets in useless litigation: Smith v. Beal, 25 O. R. 368. In an action by a simple contract creditor to set aside a transfer or conveyance as fraudulent, the transferor or grantor is a necessary party: Gibbons v. Darvill, 12 P. R. 478; and in Ferguson v. Kenny, 16 A. R. 276, the Court of Appeal on the argument expressed the opinion that the transferor or grantor should in all cases be made a party.

The sheriff takes an assignment as a public officer, and cannot disclaim, and in case of death his duties and rights as an assignee devolve upon his deputy, and even after his death a creditor has no right to attack in his own name a transaction as fraudulent: Brown v. Grove, 18 O. R. 311.

It would seem that the "exclusive right" of the assignee is limited to the matters specifically mentioned in the first clause: Campbell v. Hally, 22 A. R. 217; Doull v. Kopman, 22 A. R. 447; and the rights of the assignee under this section are limited to representing those only who are creditors of the particular persons of whom he is assignee: Adams v. Watson Manufacturing Co. (Ltd.), 15 O. R. 218; 16 A. R. 2.

The assignee may in good faith compromise any action or claim, and no creditor can thereafter assert the compromised right: Keyes v. Kirkpatrick, 19 O. R. 572; Campbell v. Hally, 22 A. R. 217; nor can the assignor himself if he obtains a discharge and repurchases the assets: Selig v. Lion, [1891] 1 Q. B. 513. But a creditor may, after an assignment, and after execution of a composition agreement, bring an action in the assignee's name to recover goods fraudulently concealed by the assignor at the time of the assignment: Doull v. Kopman, 22 A. R. 447.

Acts done by the assignee in his personal capacity do not prejudice the creditors: MacTavish v. Rogers, 23 A. R. 17.

A creditor may bring an action in the assignee's name with his consent without an order, but any recovery will then be for the benefit of the estate: Doull v. Kopman, 22 A. R. 447. If the action is brought after an order is obtained the recovery is for the bene-

fit of the attacking creditor, but is limited to the amount of his claim at the time the order is obtained: MacTavish v. Rogers, 23 A. R. 17.

The assignee may sue in this Province persons residing in the Province of Quebec to set aside a transfer made in this Province: Clarkson v . Dupré, 16 P. R. 521.

By section 2 of 55 V. c. 26 (now section 38 of 57 V. c. 37), it is provided that in the application of the Bills of Sale Act, the words "void as against creditors" shall extend to an assignee for the general benefit of creditors, as well as to creditors having executions. This section has been strictly construed, and it has been held that the assignee can take advantage only of those sections of the Bills of Sale Act in which the words "void as against creditors" occur, and that he cannot object to the want of valid renewal: Tallman v. Smart, 25 O. R. 661. It has been held that possession taken by the chattel mortgagee before the assignment is made cures any defects: Meriden Britannia Co. v. Braden, 21 A. R. 352; Clarkson v. McMaster, 22 A. R. 138; Gillard v. Bollert, 24 O. R. 147; but Clarkson v. McMaster was reversed in the Supreme Court of Canada, and taking possession is held to be of no avail: 25 S. C. R. 96.

It has also been held that, apart from the special statutory provisions, an assignee for the benefit of creditors under this Act is in no higher position than the assignor, and is

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subject to all the equities affecting the assignor: Robinson v. Cook, 6 O. R. 590; Lumsden v. Scott, 4 O. R. 323; Kerry v. James, 21 A. R. 338; Ball v. Tennant, 21 A. R. 602; Kitching v. Hicks, 6 O. R. 739; Thibaudeau v. Paul, 26 O. R. 385; but in Clarkson v. McMaster, 25 S. C. R. 96, the assignee's higher status as representative of the creditors seems to be recognized, and apparently an assignee under this Act must be held to have the same rights as an assignee under the Insolvent Act: Re Barrett, 5 A. R. 206. This being so it would seem to be no longer law that an assignee for the benefit of creditors is bound by an assignment of book debts made by his assignor, and does not obtain priority over the holder of the assignment of the book debts by the making of the assignment for the benefit of creditors, or even by the giving of notice to the debtors, as held in Thibaudeau v. Paul, 26 O. R. 385. See Jenks v. Doran, 5 A. R. 558, and Rutter v. Everett, [1895] 2 Ch. 872. See also Wigram v. Buckley, [1894] 3 Ch. 483.

Apart from the Act, making an assignment does not deprive creditors of the right to attack a fraudulent transaction: Macdonald v. McCall, 12 A. R. 593; 13 S. C. R. 247; Kitching v. Hicks, 6 O. R. 739.

If an agent purchases goods for his principal with money supplied by the latter there is a trust impressed upon the goods in the principal's favour enforceable against the

agent's assignee for the benefit of creditors: Long v. Carter, 23 A. R. 121.

8. If the person to whom any gift, conveyance, assignment, transfer, delivery or payment as in section 2 of this Act is mentioned, has been made shall have sold or disposed of the property which was the subject of such gift, conveyance, assignment, transfer, delivery or payment, or any part thereof, the moneys or other proceeds realized therefor, may be seized or recovered in any actions under the last preceding section as fully and effectually as the property if still remaining in the possession or control of such person could have been seized or recovered. 48 V. c. 26, s. 8.

(1) In case of a gift, conveyance, assignment or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made shall have sold or disposed of the

property or any part thereof, the money or other proceeds realized therefor by such person may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but shall exist in favour of all creditors of such debtor in case there is no such assignment.

(2) Where there has been no assignment for the benefit of creditors, and the proceeds realized as aforesaid are of a character to be seizable under execution, they may be seized under the execution of any creditor issued against the debtor, and shall be distributable amongst the creditors under The Creditors' Relief Act

and the Acts amending the same or otherwise.

(3) Where there has been no assignment for the benefit of creditors, and whether the proceeds realized aforesaid are or are not of a character to be seized under execution, an action may be brought therefor by a creditor (whether an execution creditor or not), on behalf of himself and all other creditors, or such other proceedings may be taken as may be necessary to render the said proceeds available to the general benefit of the creditors.

(4) The preceding section shall not apply as against innocent purchasers of the property.

Subsections (1), (2), (3), and (4), were added by 58 V. c. 23. The result of the authorities seems to be that apart from the provisions of the original section, the proceeds of the fraudulently acquired property could not be followed if they were not ear-marked: Ross v. Dunn, 16 A. R. 552; Robertson v. Holland, 16 O. R. 532; Harvey v. McNaughton, 10 A. R. 616; Stuart v. Tremain, 3 O. R. 190; Davis

v. Wickson, 1 O. R. 369. Some of the earlier cases at first sight appear to support a different view. In Martin v. McAlpine, 8 A. R. 675, a creditor who obtained the proceeds of goods sold by the sheriff under his collusive judgment, was ordered to pay over the proceeds to another creditor, who successfully attacked the collusive judgment. Spragge, C.J.O., who delivered the judgment of the Court, puts this right of payment upon the ground that the moneys were wrongfully received by the defendant from the sheriff, and were really the moneys of the plaintiff, and he refers to Merchants Express Co. v. Morton, 15 Gr. 274, as an example of the well-known principle that if the Court can trace money or property, however obtained from the party really entitled to it, into any other shape, it will intervene to secure it for the true owner, or party entitled. In Labatt v. Bixel, 28 Gr. 593, an assignment of book debts was set aside and the defendant was ordered to account for the moneys collected by him, but in Tennant v. Gallow, 25 O. R. 56, Rose, J., states that this was probably on the ground that the moneys were collected after the commencement of the action, and it was in that case held that where an insolvent debtor conveyed property to a creditor, who sold it, and paid his own claim and some other claims, and gave the balance to the debtor, another creditor had no remedy against the creditor thus paid. Masuret v. Stewart, 22 O. R. 290, where a creditor obtained judgment for the proceeds of the sale against

the grantee, who had sold the fraudulently transferred property, is also there referred to as a case standing upon its own special facts, and an examination of the case will show that the transaction was really a mere collusive one, and that the defendant was really a figurehead.

If in an action by the assignee a security is set aside as preferential the preferred creditor must account for moneys received under the security: Meharg v. Lumbers, 23 A. R. 51.

The present amending sections are no doubt intended to give creditors the right the assignee had under the original section; but they are certainly not happily expressed and need judicial interpretation.

9. An assignment for the general benefit of creditors under this Act shall take precedence of all attachments, all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's

hands. 48 V. c. 26, s. 9; 49 V. c. 25, s. 2; 59 V. c. 31, s. 2.

This section was amended in the session of 1896 by the insertion of the words "all attachments," 59 V. c. 31, s. 2. Before this it was held that attachment proceedings were not affected by an assignment for the benefit of creditors: Wood v. Joselin, 18 A. R. 59; In re Thompson, 17 P. R. 109.

Mechanics' liens are not affected by an assignment for the benefit of creditors: 59 V. c. 35, s. 12.

A judgment for alimony is not affected by the section: Abraham v. Abraham, 19 O. R. 256; 18 A. R. 436.

The first execution creditor has a lien for the whole costs of the action for which he obtained judgment, and not for the costs of the execution merely: Ryan v. Clarkson, 16 A. R. 311; 17 S. C. R. 251; and the sheriff is entitled to hold the goods until the costs and his own poundage and possession money are paid: Smith v. Antipitzky, 10 C. L. T. Occ. N. 368.

"Executed by payment" means executed by payment to the sheriff: Clarkson v. Severs, 17 O. R. 592; and where there has been a sale in a mortgage action for sale, and, before

creditors prove their claims, the mortgagor makes an assignment for the benefit of creditors, the fund passes to the assignee: Carter v. Stone, 20 O. R. 340.

Costs in the Division Court are provided for by section 52 V. c. 12, s. 2, which is as follows:—"Where in any Division Court action a bailiff has seized goods under and by virtue of a writ of execution or attachment, and the action is afterwards settled between the parties thereto, or the defendant in the action makes an assignment for the general benefit of his creditors, the said bailiff shall, until his fees and disbursements upon the said writ are fully paid and satisfied, have a lien therefor upon so much of the said goods as will reasonably satisfy the same, but in the event of a dispute as to the proper amount of said fees and disbursements, the amount claimed therefor may be paid into Court until the proper amount shall be certified by the Judge, and on such payment into Court the said lien shall cease and determine." It will be noticed that this provides only for the bailiff's fees and disbursements, and not for the costs of suit.

By 58 V. c. 47, s. 7, goods in the assignee's possession are protected from distress for taxes, other than taxes due by the assignor, and taxes due in respect of the premises in which the goods were at the time of the assignment, and thereafter while the assignee

occupies the premises or the goods remain thereon.

10. No advantage shall be taken or gained by any creditor of any mistake, defect or imperfection in any assignment under this Act for the general benefit of creditors if the same can be amended or corrected, and if there be any mistake, defect or imperfection therein the same shall be amended by any Judge of the High Court, or of the County Court aforesaid, on application of any creditor of the assignor, or of the assignee, on such notice being given to other parties concerned as the Judge shall think reasonable, and the amendment, when made, shall have relation back to the date of the said assignment. 48 V. c. 26, s. 10.

The omission of any reference to real property is not a mistake, defect, or imperfection, that can be remedied under this section: Blain v. Peaker, 18 O. R. 109.

11. (1) The assignee shall receive such remuneration as shall be voted to him by the creditors at any meeting called for

the purpose after the first dividend sheet has been prepared, or by the inspectors, in case of the creditors failing to provide therefor, subject to the review of the County Court of the county in which the assignment is registered or the Judge thereof, if complained of by the assignee or any of the creditors. 48 V. c. 26, s. 11.

(2) In case the remuneration of the assignee has not been fixed under the preceding sub-section before the final dividend, the assignee may insert in the final dividend sheet, and retain as his remuneration, a sum not exceeding five per cent. of the cash receipts, subject to review by the court or judge as hereinbefore provided; but no application by the assignee to review the said allowance shall be entertained, unless the question of his remuneration, previous to the preparation of the final dividend sheet has been brought before a meeting of creditors competent to decide the same. 59 V. c. 31, s. 8.

(3) No assignee shall make any payment or allowance to an inspector beyond his actual and necessary travelling expenses in and about his duties as inspector, except under the authority of a resolution of the creditors passed at a meeting regularly called, fixing the amount thereof, and in the notice calling the meeting the fixing of the remuneration of the inspectors shall be specially mentioned as one of the subjects to be brought before the meeting. No inspector shall be allowed more than four dollars a day besides actual travelling expenses, but may be allowed less. 59 V. c. 31, s. 7.

Under the Insolvent Act of 1875, the assignee was entitled to a commission on the net proceeds of the estate of the insolvent of every kind, of 5 per cent. on the first $1,000, 2½ per cent. on any further sum up to $5,000, and 1¼ per cent. on any further sum., Under the present Act the assignee's fee is usually about five per cent. on the amount of the receipts, and sub-section 2 now makes this the maximum allowance, but there is, unfortunately, great looseness in dealing with this matter, and very often the assignee pockets

the remuneration that he considers himself entitled to and consults nobody. His remuneration ought to be fixed according to the principles regulating the remuneration of ordinary trustees: Re Fleming, 11 P. R. 426; Archer v. Severn, 13 O. R. 316; Re Prittie Trusts, 13 P. R. 19. In the last case the trustee was allowed a commission on rents collected, in addition to a commission paid to an agent.

The Judge acts as persona designata, and he can deal only with the question of remuneration, and before the enabling Act, 56 V. c. 13, he had no power to give costs in an application under this section: Re Pacquette, 11 P. R. 463; Re Young, 14 P. R. 303.

An assignee is not responsible for loss resulting from the criminal acts of a servant selected and employed by him without negligence: Jobson v. Palmer, [1893] 1 Ch. 71.

The powers and duties of inspectors are not fully defined in the Act. They have power under this section to fix the assignee's remuneration if the creditors do not do so, and under section 21, they can order the assignee to declare dividends. Then under the amending Acts of 1895, 58 V. c. 23, and of 1896, 59 V. c. 31, they can take proceedings for the examination of the insolvent and his employees. They are so far trustees for the creditors that they cannot purchase the trust

estate without the creditors' consent: Morrison v. Watts, 19 A. R. 622; or at private sale: Thompson v. Clarkson, 21 O. R. 421; or in any way make a profit at the expense of the estate: Segsworth v. Anderson, 24 S. C. R. 699, reversing 21 A. R. 242, and restoring the judgment of Meredith, J., 23 O. R. 573; and they cannot, unless specially authorized by the creditors, dispose of the estate: Morrison v. Watts, 19 A. R. 622; for the disposal of the estate is in the hands of the creditors, and in default in that of the Judge of the County Court: ibid.

Subsection 3 is a move in the right direction of curtailing the fees that inspectors have been in the habit of arbitrarily helping themselves to. The maximum allowance is very ambiguously limited, as it is almost impossible to say how many "days" an inspector should be paid for. A reasonable interpretation would be to allow pay for each day upon which a meeting of inspectors takes place, and the resolution appointing the inspectors should provide that there be paid to each inspector for each meeting actually attended by him the sum of $, not exceeding for any inspector the sum of $. In the notice calling the first meeting the remuneration of the inspectors should be mentioned as one of the subjects to be brought before the meeting (see p. 102). Under the English Act an inspector cannot without the direction of the Court receive any remuneration, and cannot charge for

services rendered by him as solicitor: In re Gallard, [1896] 1 Q. B. 68. The present section does not go so far, and it would seem that an inspector can act as solicitor for the estate: Strachan v. Ruttan, 15 P. R. 109; In re Mimico Sewer Pipe and Manufacturing Co., Pearson's Case, 26 O. R. 289.

12. (1) No assignment made for the general benefit of creditors under this Act shall be within the operation of the Act respecting Mortgages and Sales of Personal Property; but a notice of the assignment shall, as soon as conveniently may be, be published at least once in the Ontario Gazette and in one newspaper at the least, having a general circulation in the county in which the property assigned is situate, not less than twice. 48 V. c. 26, s. 12 (1); 49 V. c. 25, s. 5.

(2) A counterpart or copy of every such assignment shall also within five days from the execution thereof be registered, (together with an affidavit of a witness thereto of the due execution of the assignment or of the due execution of the

assignment of which the copy filed purports to be a copy), in the office of the clerk of the County Court of the county or union of counties where the assignor, if a resident in Ontario, resides at the time of the execution thereof, or if he is not a resident then in the office of the clerk of the County Court of the county or union of counties where the personal property so assigned is or where the principal part thereof (in case the same includes property in more counties than one) is at the time of the execution of the assignment; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter such assignments, and be entitled to the same fees for services in the same manner as if such assignments had been

registered under the Act respecting Mortgages and Sales of Personal Property. 48 V. c. 26, s. 12 (2).

(3) In the districts of Muskoka, Parry Sound, Nipissing, Algoma, Manitoulin, Thunder Bay and Rainy River, and in any other district which may be hereafter formed, and in the Provisional County of Haliburton the counterpart or copy of the assignment shall be filed in the same office and within the same time respectively as by the law at the time of the assignment in force mortgages and bills of sale of personal property are required to be filed in such districts, and provisional county respectively, and the clerk in whose office the same is filed shall perform the like duties and be entitled to be paid the like fees as clerks acting under the preceding sub-section. 59 V. c. 31, s. 1.

Registration of the assignment in the proper office is sufficient foundation for the renewal of a chattel mortgage by the assignee:

Fleming v. Ryan, 21 A. R. 39; 57 V. c. 37, s. 18.

The Act respecting Mortgages and Sales of Personal Property requires from the mortgagee an affidavit of bona fides. In the case of an assignment for the benefit of creditors this is unnecessary. The fee for registration is fifty cents.

The notice of the assignment here spoken of is the simple notice that the assignment has been made. In practice, however, it is usual to join with this notice a notice to creditors to prove claims and a notice of distribution of the estate. (See notes to section 20).

Registration of an assignment affecting goods and chattels situate in the Districts or in Haliburton should be effected as follows, seven days being allowed for registration in Haliburton and ten days for registration in the Districts:

Algoma—Clerk of District Court at Sault Ste. Marie: 59 V. c. 32.

Haliburton—Clerk of Division Court at Minden: 59 V. c. 32.

Manitoulin—Deputy Clerk for Manitoulin at Gore Bay: 57 V. c. 37, s. 28.

Muskoka—Clerk of Division Court at Bracebridge: 59 V. c. 32.

Nipissing—Clerk of District Court at North Bay: 59 V. c. 32.

Parry Sound—Clerk of Division Court at Parry Sound: 59 V. c. 32.

Rainy River—Clerk of Division Court at Rat Portage: 59 V. c. 32.

Thunder Bay—Clerk of District Court at Port Arthur: 59 V. c. 32.

An error as to the place of registration is not, however, of much importance: see section 15.

13. (1) If the said notice is not published in the regular number of the Ontario Gazette, and of such newspaper as aforesaid, which shall respectively be issued first after five days from the execution of the assignment by the assignor, or if the assignment is not registered as aforesaid within five days from the execution thereof, the assignor shall be liable to a penalty of $25 for each and every day which shall pass after the issue of the number of the newspaper in which the notice should have appeared until the same shall have been published; and a like penalty for each and every day which shall pass after the expiration of five days from the

execution of the assignment by the assignor until the same shall have been registered.

(2) The assignee is to be subject to a like penalty for each and every day which shall pass after the expiration of five days from the delivery of the assignment to him, or of five days after his assent thereto, the burden of proving the time of such delivery or assent being upon the assignee.

(3) Such penalties may be recovered summarily before a Judge of the High Court, or of the County Court of the county in which the assignment ought to be published or registered; one-half of the penalty shall go to the party suing, and the other half for the benefit of the estate of the assignor. 48 V. c. 26, s. 13.

(4) In case of an assignment to the sheriff, he shall not be liable for any of the penalties imposed in this section, unless he has been paid or tendered the

cost of advertising and registering the assignment, nor shall he be compelled to act under assignment until his costs in that behalf are paid or tendered to him. 50 V. c. 19, s. 10.

14. In case the assignment be not registered, and notice thereof published, an application may be made by any one interested in the assignment to a Judge of the High Court, or of the County Court aforesaid, to compel the publication and registration thereof; and the Judge shall make his order in that behalf, and with or without costs, or upon the payment of costs by such person as he may in his discretion direct to pay the same. 48 V. c. 26, s. 14.

15. The omission to publish or register as aforesaid, or any irregularity in the publication or registration, shall not invalidate the assignment. 48 V. c. 26, s. 15.

16. It shall be the duty of the assignee to immediately inform himself, by reference to the debtor and his records of account, of the names and residences of the debtor's creditors, and within five days from the date of assignment to convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate, by mailing prepaid and registered to every creditor known to him, a circular calling a meeting of creditors to be held in his office or other convenient place to be named in the notices not later than twelve days after the mailing of such notice, and by advertisement in the Ontario Gazette; and all other meetings to be held shall be called in like manner. 48 V. c. 26, s. 16.

17. (1) In case of a request in writing signed by a majority of the creditors having claims duly proved of $100 and upwards, computed according to the pro-

visions of section 19 of this Act, it shall be the duty of the assignee within two days after receiving such request, to call a meeting of the creditors at a time not later than twelve days after the assignee receives the request. In case of default the assignee shall be liable to a penalty of $25 for every day after the expiration of the time limited for the calling of the meeting until the meeting is called. 50 V. c. 19, s. 8.

(2) In case a sufficient number of creditors do not attend the meeting mentioned in section 16 of this Act, or fail to give directions with reference to the disposal of the estate, the Judge of the County Court may give all necessary directions in that behalf. 50 V. c. 19, s. 11.

The disposal of the estate is in the hands of the creditors, and if they fail to give directions, the Judge of the County Court may give all necessary directions: Morrison v. Watts, 19 A. R. 622. In the absence of

special directions, the assignee should realize the assets as quickly and as advantageously as possible. He cannot himself purchase, even with the inspectors' consent: Morrison v. Watts, 19 A. R. 622.

It is usual to sell the stock-in-trade and fixtures en bloc by auction as soon as possible. The following form of conditions of sale and agreement to purchase is frequently used:

CONDITIONS OF SALE.

Conditions of Sale of the stock-in-trade and fixtures of the estate of

1. The stock-in-trade and fixtures mentioned in the inventory produced are sold at a rate upon the dollar of the inventory value thereof, without reduction or abatement, except as regards shorts and longs in quantities, which are to be adjusted by inventory prices before settlement of purchase.

2. The highest bidder shall be the purchaser, and if any dispute arises as to the last or highest bid, the stock-in-trade and fixtures shall be put up at a former bidding.

3. No person shall retract his bid.

4. The assignee reserves the right to one bid.

5. The purchaser shall at the time of sale sign the annexed agreement for purchase, and shall pay down a deposit of ten per cent. of his

purchase money to the assignee and sufficient therewith to make one-fourth of the purchase money in five days, and the balance in three equal instalments secured to the satisfaction of the assignee, at two, four and six months, with interest at six per cent. per annum. And upon the full completion of such purchase, the purchaser shall be entitled to be put into possession.

6. Time shall be considered of the essence of these conditions and the agreement to purchase, and if the purchaser fail to comply with these conditions or any of them, the deposit shall be forfeited to the assignee, who shall be at liberty to re-sell the goods, without notice to the defaulter; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

7. The purchaser shall have five days to check the inventory and stock-in-trade and fixtures free of expense, after which the purchaser is to assume the rent and taxes and other rates, and to arrange with the landlord of the premises as to tenancy.

AGREEMENT FOR PURCHASE.

It is hereby declared and agreed, by and between the vendor of the stock-in-trade and fixtures referred to in the annexed conditions of sale, and

that the said has become the purchaser of the said stock-in-trade and fixtures at the rate of cents on the dollar of the inventory value thereof, and that the sum of has been paid by the said to the said by way of deposit and in part payment of said purchase money, and that the particulars and conditions of sale shall be taken as the terms of agreement for the said sale and purchase respectively, and be observed and fulfilled by the said . and respectively in all things.

As witness their hands this day of

Witness:

18. At any meeting of creditors the creditors may vote in person, or by proxy authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim stating the amount and nature thereof. 48 V. c. 26, s. 17.

Claims must be proved by affidavit, though statutory declarations are very commonly accepted.

The affidavit must be sworn before a person authorized to take the affidavits for use in the High Court of Justice, or before a Justice of the Peace in Ontario, or before a Notary Public. (Section 24.)

The following form of affidavit and proxy is sufficient:

AFFIDAVIT OF CLAIM.

IN THE MATTER OF AN ACT RESPECTING ASSIGNMENTS AND PREFERENCES BY INSOLVENT PERSONS, R. S. O. 1887, c. 124, AND AMENDING ACTS.

And in the matter of

of the of in the

county of DEBTOR,

and of the

of in the county of

CLAIMANT.

I, (*name in full*), of the

(*occupation*) make oath and say:

1. I am[1]

2. The above named debtor is justly and truly indebted to the claimant in the sum of $\frac{}{100}$ dollars, and the particulars of the said indebtedness are set out in the statement hereto annexed marked "A."

1. "The above named Claimant," or "a partner in the above named Claimant firm," or "the duly authorized agent of the above named Claimant."

2. "No security whatever for the said claim or any part thereof," or "the following security, that is to say, which is of the value of."

3. The claimant holds[2]

Sworn before me at the
of in the
county of the
day of
A. D. 189

To be sworn before a Notary Public or a Commissioner authorized to take affidavits for use in Ontario, or a Justice of the Peace in Ontario.

PROXY.

above named hereby authorize and empower to represent at all meetings of creditors in this matter, and to vote and act for at such meetings in respect to claim above set out, and in all respects to represent as if were present and acting in the premises.

Dated at the day of 189

Signed in the presence of

19. (1) Subject to the provisions of section 6, all questions discussed at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:

For every claim of or over—

$100,	and not exceeding	$200	1 vote.
200,	" "	500	2 votes.
500,	" "	1,000	3 votes.

Additional $1,000 or fraction thereof 1 vote.

(2) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

(3) In case of a tie the assignee, or if there are two assignees, then the assignee appointed by the creditors, or by the Judge, if none has been appointed by the creditors, shall have a casting vote. 48 V. c. 26, s. 18 (1-3).

(4) Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate. 48 V. c. 26, s. 18 (4); 50 V. c. 19, s. 5

(5) If a creditor holds a claim based upon negotiable instruments upon which

the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and re-value his claim. 48 V. c. 26, s. 18 (5).

(*b*) In case a person claiming to be entitled to rank on the estate assigned holds security for his claim or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security, the Judge of the County Court of the County wherein the debtor at the time of making the assignment resided or carried on business, may, upon summary application by the assignee or by any other person interested in the debtor's estate, of which application three

days' notice shall be given to such claimant, order that, unless a specified value shall be placed on such security and notified in writing to the assignee within a time to be limited by the order, such claimant shall, in respect of the claim, or the part thereof for which the security is held in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate; and if a specified value is not placed on such security, and notified in writing to the assignee according to the exigency of the said order, or within such further time as the said Judge may by subsequent order allow, the said claim, or the said part, as the case may be, shall be wholly barred as against such estate but without prejudice to the liability of the debtor therefor. 59 V. c. 31, s. 3.

Apart from the statute, one creditor cannot, in the administration of an estate, be compelled to value any securities held by him. He is entitled to rank for the full amount of his claim and to realize any securities as well,

provided he does not receive in all more than 100 cents in the dollar: Beaty v. Samuel, 29 Gr. 105; Eastman v. Bank of Montreal, 10 O. R. 79; Young v. Spiers, 16 O. R. 672; Molsons Bank v. Cooper, 23 A. R. 146. Under this section the creditor need not value security given by a third person for the debtor, e.g., a guarantee, but if the guarantee is a general one, and not for the ultimate balance only, the guarantor, upon payment of the amount of the guarantee, is entitled to rank for the amount: Martin v. McMullen, 19 O. R. 230; 20 O. R. 257; 18 A. R. 559; and a firm and an individual partner are for this purpose treated as distinct persons, so that security by an individual partner for a firm debt need not be valued, nor in the converse case: Re Jones, 2 A. R. 626; In re Chaffey, 30 U. C. R. 64; Re Baker, 3 Ch. Ch. 499. Where, however, payment of goods has been guaranteed and the vendors seek to rank on the guarantor's estate, they must value the liability of the purchaser: Wyld v. Clarkson, 12 O. R. 589; and where a debt was payable to executors and there were vested in them lands in which the debtor had an interest, it was held that this interest must be valued: Tillie v. Springer, 21 O. R. 585; but where payment of a promissory note was guaranteed and the payee discounted the note and transferred the benefit of the guarantee and then failed, the transferee was held entitled to rank upon the payee's estate without valuing the guarantee:

In re Hallett & Co., [1894] 2 Q. B. 256. Guarantors may make payments to a suspense account and the creditor may rank against the co-guarantor's estate for the full amount of the claim without giving credit for the amount of this suspense account: Commercial Bank of Australia v. Official Assignee of Wilson [1893] A. C. 181; and see Molsons Bank v. Cooper, 23 A. R. 146. Under the similar section of the Insolvent Act it has been held that the creditor holding security may give it up and prove for the whole claim, or that he may value it and prove for the balance, or that he may keep it and not prove at all: Deacon v. Driffil, 4 A. R. 335; but that he cannot keep the security and realize it and then prove for the balance: Re Beaty, 6 A. R. 40; and that where the creditor values his security the estate must promptly decide whether it is to be taken over or not, and that if it is not promptly taken over the inference is that the creditor is intended to keep it, and he becomes the absolute purchaser of it at the value placed upon it by him: Bell v. Ross, 11 A. R. 458. So on the other hand a creditor cannot, after valuing his security and having that value accepted by the assignee, amend his claim by reducing the value: Re Street, 15 C. L. J. 86.

Clause (b) was added by 59 V. c. 31, s. 3, and is intended to remedy the difficulty that has often been occasioned by the secured creditor's delay or refusal to value.

20. (1) Every person claiming to be entitled to rank on the estate assigned shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of. 48 V. c. 26, s. 19 (1).

(2) In case a person claiming to be entitled to rank on the estate assigned, does not within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim as provided by this and the preceding sections of this Act, the Judge of the County Court of the County wherein the debtor at the time of making the assignment resided or carried on business, may, upon a summary application by the assignee or by any other person interested in the debtor's estate (of which application at least three days' notice shall be given to the person alleged to have made default in proving a claim as aforesaid),

order that unless the claim be proved to the satisfaction of the Judge within a time to be limited by the order, the person so making default shall no longer be deemed a creditor of the estate assigned, and shall be wholly barred of any right to share in the proceeds thereof; and if the claim is not so proved within the time so limited, or within such further time as the said Judge may by subsequent order allow, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the debtor therefor. 50 V. c. 19, s. 6, part.

(3) The preceding subsection is not intended to interfere with the protection afforded to assignees, by section 36 of the Act respecting Trustees and Executors, and the Administration of Estates. 50 V. c. 19, s. 6, part.

(4) A person whose claim has not accrued due shall nevertheless be entitled

to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due. 48 V. c. 26, s. 19 (2).

(5) At any time after the assignee receives from any person claiming to be entitled to rank on the estate, proof of his claim, notice of contestation of the claim may be served by the assignee upon the claimant. Within thirty days after the receipt of the notice, or such further time as a Judge of the County Court of the county in which the assignment is registered may on application allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action served on the assignee; and in default of such action being brought and writ served within the time aforesaid, the claim to rank on the estate shall be forever barred.

(*a*) The notice by the assignee shall contain the name and place of business of one of the solicitors of the Supreme Court of Judicature for Ontario, upon whom service of the writ may be made; and service upon such solicitor shall be deemed sufficient service of the writ. 50 V. c. 19, s. 7.

(*b*) In case the assignee is satisfied with the proof adduced in support of any claim, but the debtor disputes the same, such debtor shall do so by notice in writing to the assignee, stating the grounds upon which he disputes the claim; and such notice shall be given within ten days of such debtor's being notified in writing by the assignee that he is satisfied with the proof adduced as aforesaid, and not afterwards unless by special leave of the said Judge. 59 V. c. 31, s. 4 (*b*).

(*c*) If upon receiving such notice of dispute the assignee does not deem it proper to require the claimant to bring an action

to establish his claim, he shall notify the debtor in writing of this fact, and the debtor may thereupon, and within ten days' of his receiving such notice, apply to the said Judge for an order requiring the assignee to serve a notice of contestation. 59 V. c. 31, s. 4 (*c*).

(*d*) The Judge shall only make such order if after notice to the assignee the Judge is of opinion that there are good grounds for contesting the claim. 59 V. c. 31, s. 4 (*d*).

(*e*) In case the debtor does not make such application, the decision of the assignee shall as against him be final and conclusive. 59 V. c. 31, s. 4 (*e*).

(*f*) If upon such application the claimant consents in writing, the Judge may, in a summary manner, decide the question of the validity of the claim. 59 V. c. 31, s. 4 (*f*).

(*g*) If an action is brought by the claimant against the assignee the debtor may

intervene at the trial, either personally or by counsel, for the purpose of calling and examining or cross-examining witnesses. 59 V. c. 31, s. 4 (*g*).

(6) (1) The assignee may, if he deems it advisable so to do, take the proceedings authorized by section 32 of the Creditors' Relief Act to be taken by a sheriff, and in that case sections 32 and 33 of the said Act shall apply to proceedings for the distribution of moneys and determination of claims arising under an assignment made under the said Act respecting Assignments and Preferences by Insolvent Persons, with the substitution of "assignee" for "sheriff" where it occurs in said section 32; and the substitution of "according to law" for "as directed by this Act," where these words occur in said section 32; but this section shall not be construed to relieve the assignee from mailing to each creditor the abstract and other information required by section 22 of the Act respecting Assignments and Prefer-

ences by Insolvent Persons to be sent to creditors, so far as the same is not contained in the list sent by him under section 32 aforesaid. 59 V. c. 31, s. 6 (1).

(2) The Judge of the County Court of the county wherein the debtor at the time of the assignment resided or carried on business shall be the Judge to whom applications under this section shall be made. 59 V. c. 31, s. 6 (2).

If a creditor holds negotiable paper for his claim it should be produced and the amount of any dividends endorsed upon it.

If the assignee is a creditor his rights as creditor are not lost or merged: Robinson v. Cook, 6 O. R. 590.

A cestui que trust ranks against the estate of his trustee as an ordinary claimant only: Culhane v. Stuart, 6 O. R. 97; and creditors residing in a foreign country are entitled pari passu with the creditors in this Province: Milne v. Moore, 24 O. R. 456. In fact, apart from the special provisions as to rent and wages, all creditors share equally. Even the Crown has no priority: Clarkson v. Attorney-General of Canada, 16 A. R. 202. But if money is entrusted to an agent to be used in

the purchase of goods, and some of the money is in the agent's hands at the time of his assignment the principal is entitled to it as against the assignee: Long v. Carter, 23 A. R. 121.

The making of an assignment does not stop the running of interest: Stewart v. Gage, 13 O. R. 458, there being no restrictive provisions as in the Insolvent Act: In re McDougall, 8 A. R. 309.

It has been held in administration proceedings that claims may be sent in or amended at any time before the final distribution of the estate: but that dividends actually paid cannot be disturbed: Andrews v. Maulson, 1 Ch. Ch. 316; In re Metcalfe, Hicks v. May, 13 Ch. D. 236; Gillespie v. Alexander, 3 Russ. 130; Greig v. Somerville, 1 R. & M. 338; Ex parte Boddam, 2 DeG. F. & J. 625; Broadbent v. Thornton, 4 DeG. & S. 65; Holmsted and Langton, pp. 179, 180, 777. The same doctrine ought to apply under this Act.

A debt payable in futuro in five annual instalments is provable by virtue of sub-section 4; Tillie v. Springer, 21 O. R. 585. The question whether a claim can be made for future gales of rent has been raised but not settled. The opinions of two leading counsel on the question are in direct contradiction, but having regard to the scope of the Act the better opinion would seem to be against such a right. See In re Harte and the Ontario Express and

Transportation Co., 22 O. R. 510; Connolly v. Coon, 23 A. R. 37; and Grant v. West, Court of Appeal, 12th May, 1896.

Subsection 5 applies only to a right of action against the estate, and failure to enforce the alleged right of action does not bar the right to set off the claim against the purchaser from the assignee of a debt alleged to be due by the claimant: Johnston v. Burns, 23 O. R. 179, 582.

There is no presumption against the validity of claims by relations. As Lord Eldon says, a man is more likely to apply for loans to his relations than to any one else: Ex parte Gardner, 1 V. & B. 45. A wife may rank against the husband's estate, but there must be clear and conclusive evidence to support her claim: Re Miller, 1 A. R. 393.

The landlord's rights in case of an assignment for the benefit of creditors are defined by subsections 4 and 5 of R. S. O. (1887) c. 143, (as amended by section 3 of 58 V. c. 26), as follows:

"In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of one year last previous to, and for three months following, the execution of such assignment and from thence so long as the assignee shall retain possession of the premises leased.

"Notwithstanding any provision, stipulation or agreement in any lease or agreement contained, in case of an assignment for the general benefit of creditors, or in case an order is made for the winding up of an incorporated company, being lessees, the assignee or liquidator shall be at liberty within one month from the execution of such assignment or the making of such winding-up order by notice in writing under his hand given to the lessor to elect to retain the premises occupied by the assignor or company as aforesaid at the time of such assignment or winding up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit, upon the terms of such lease and paying the rent therefor provided by said lease."

This section applies only to assignments made after the 16th of April, 1895, and repeals subsection 4 of section 28 of R. S. O. (1887) c. 143, which was the same in effect as section 74 of the Insolvent Act of 1875, and was as follows:—"In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of one year last previous to the execution of such assignment, and from thence so long as the assignee shall retain the premises leased."

In the absence of special restriction, every tenant, except a tenant at sufferance, may

assign the term, and the lessor cannot object: Woodfall's Law of Landlord and Tenant, 15th ed., p. 269; but most written leases contain the statutory covenant that the lessee "will not assign or sublet without leave," and the provision that "if the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the lessee or his assigns, or if the lessee or his assigns shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current quarter's rent shall immediately become due and payable, and the term shall immediately become forfeited and void." Apart from the provisions of the present section, an assignment for the benefit of creditors by a tenant who holds under a lease with this covenant or this provision, gives the landlord the right to eject, and this without preliminary notice of the breach: Kerr v. Hastings, 25 C. P. 429; Magee v. Rankin, 29 U. C. R. 257; Barrow v. Isaacs & Son, [1891] 1 Q. B. 417; Argles v. McMath, 26 O. R. 224; 23 A. R. 44; and acceptance of payment of arrears due before the making of an assignment is not a waiver of the right of forfeiture: Dobson v. Sootheran, 15 O. R. 15. Such a proviso for forfeiture applies only in respect of the status of the holder for the time being of the term; and therefore the lessor, after a valid assignment of the term has been made, cannot take advantage of the fact that the original lessee

has become bankrupt: Smith v. Gronow, [1891] 2 Q. B. 394; nor can the assignee of part of the reversion enforce the right of forfeiture: Mitchell v. McCauley, 20 A. R. 272. Under this section, however, the assignee is given the right to retain the demised premises upon making his election in the prescribed manner, and the question of the right of forfeiture is not of much importance.

The landlord's right to preferential payment depends upon the existence of distrainable effects, and if there is nothing upon which a distress can be levied, the landlord ranks only as an ordinary creditor: Linton v. Imperial Hotel Company, 16 A. R. 337; In re Kennedy, Mason v. Higgins, 36 U. C. R. 471; Mason v. Hamilton, 22 C. P. 190, 411; In re Hoskins, 1 A. R. 379; In re McCraken, 4 A. R. 486. It is not necessary that a distress should in fact be made, and making a distress does not give the landlord any higher right, though if before an assignment is made the arrears are recovered by distress, the landlord cannot be compelled to refund the excess over the statutory allowance: Griffith v. Brown, 21 C. P. 12; Mason v. Hamilton, 22 C. P. 190, 411; McEdwards v. McLean, 43 U. C. R. 454; In re McCraken, 4 A. R. 486. For rent accruing due after the assignment the landlord may distrain, as the goods are not by the assignment placed in custodiâ legis: Briggs v. Sowry, 8 M. & W. 729; Ex parte Hale, 1 Ch. D. 285; Eacrett v. Kent, 15 O. R. 9; Linton v. Imperial Hotel Company, 16 A. R. 337. The restriction

on the landlord's rights applies only for the benefit of the assignee as representing creditors: Railton v. Wood, 15 App. Cas. 363; and would not relieve a surety: Tuck v. Fyson, 6 Bing. 321; nor the tenant himself: Young v. Smith, 29 C. P. 109; nor a chattel mortgagee in possession before the assignment: Brocklehurst v. Lawe, 7 E. & B. 176.

While a proviso for acceleration of payment is good as between the parties: London and Westminster Loan and Discount Company v. London and North Western R. W. Co., [1893] 2 Q. B. 49; Buckley v. Taylor, 2 T. R. 600; Young v. Smith, 29 C. P. 109, it has been held, under the Insolvent Act of 1875, that such a proviso would be a fraud upon creditors, and could not be enforced: In re Hoskins, 1 A. R. 379, but a similar view of the effect of the present section: Baker v. Atkinson, 11 O. R. 735, 14 A. R. 409, has not prevailed: Linton v. Imperial Hotel Company, 16 A. R. 337. It was also held under the Insolvent Act of 1875, that as the assignment protected the goods from distress, and as the accelerated rent did not become due until after the assignment had been made, the landlord, as far as the accelerated rent was concerned, could neither distrain nor rank as a creditor: Griffith v. Brown, 21 C. P. 12; In re McCraken, 4 A. R. 486; In re Hoskins, 1 A. R. 397, but under section 28 (4) of R. S. O. (1887) c. 143, it has been held that the accelerated rent either falls due at the same instant that the assignment is made,

or at all events while the assignee "retains the premises leased," and that either way the landlord may recover: Baker v. Atkinson, 11 O. R. 735; 14 A. R. 409; Linton v. Imperial Hotel Company, 16 A. R. 337; Graham v. Lang, 10 O. R. 248; Eacrett v. Kent, 15 O. R. 9, and that recovery was not necessarily limited to a year's rent, but to the rent, whatever it might be, falling due during the year previous to the assignment, or during the period of the assignee's possession: Linton v. Imperial Hotel Company, 16 A. R. 337; and the same case decided that the parties to the lease might agree that the section should not apply. The present section enlarges the landlord's rights by giving him the right to recover "arrears" of rent due for the three months following the assignment. The clause is not happily expressed, but seems to be intended to give the landlord at least three months' rent.

Apart from the right of election given to the assignee, it would seem that a landlord could claim the accelerated rent, and yet at the same time eject the assignee.

The right of distress of a mortgagee as quasi landlord is limited to one year's arrears of interest, provided the assignee takes the proper steps to obtain the benefit of the statutory provision dealing with that right: R. S. O. (1887) c. 102, s. 17; Munro v. Commercial Building and Investment Society, 36 U. C. R.

464; Hobbs v. Ontario Loan and Debenture Company, 18 S. C. R. 483.

An assignee for the benefit of creditors under an assignment which is in terms wide enough to effect a transfer of the lease, becomes personally bound to pay rent and perform covenants as assignee of the term, and cannot disclaim, but may assign over and thus put an end to his liability: How v. Kennett, 3 A. & E. 659; Ringer v. Cann, 3 M. & W. 343; White v. Hunt, L. R. 6 Exch. 32; Kerr v. Hastings, 25 C. P. 429; Magee v. Rankin, 29 U. C. R. 257; Hopkinson v. Lovering, 11 Q. B. D. 92; Magill v. Young, 10 U. C. R. 301. A specific reference to the lease in the assignment is not necessary; such general expressions as "all property of every sort and description"; "all personal estate and effects"; "all goods and chattels and personal estate"; "all property and effects," are, unless the lease is specially excepted, sufficient: Burrill on Assignments, 6th ed., pp. 103, 110; Ringer v. Cann, 3 M. & W. 343; Palmer v. Andrews, 4 Bing. 348; White v. Hunt, L. R. 6 Exch. 32; Magill v. Young, 10 U. C. R. 301. Even though the assignee assigns over before a gale of rent falls due he is personally liable for the period during which the term has been vested in him: R. S. O. (1887) c. 143, s. 2; Woodfall's Law of Landlord and Tenant, 15th ed., p. 273; Swansea Bank v. Thomas, 4 Exch. D. 94; Ex parte Dressler, 9 Ch. D. 252; Wilson v. Wal-

lani, 5 Exch. D. 155; Graham v. Lang, 10 O. R. 248; In re Howell, [1895] 1 Q. B. 844.

There is no provision in the Act for the proof of contingent claims or claims for damages. Having regard to the language of section 4 and the terms of the form of assignment in general use, it would seem that only debts strictly so-called can be proved, so that a person who has a pending claim for damages is not a creditor: Ashley v. Brown, 17 A.R. 500; and costs incurred after the assignment, arising out of proceedings pending at the time of the assignment, do not rank: Re Dumbrill, 10 P. R. 216. Special provision is made in the Winding-up Act, R. S. C. c. 129, s. 56, for the right to rank in respect of contingent claims and claims for damages. And see Burrill on Assignments, 6th ed., p. 531, et seq.; Robson's Law of Bankruptcy, 7th ed., p. 273, et seq., and Grant v. West, Court of Appeal, 12th May, 1896.

If an assignee knows that a creditor has a claim he cannot ignore it because it is not proved; the proper course is to call upon the creditor to prove it: Carling Brewing and Malting Co. v. Black, 6 O. R. 441.

The time for bringing an action cannot be extended after the thirty days have expired: Article, 28 C. L. J. 99; and the creditor in his action is confined to the items and quantum of the affidavit of claim: Grant v. West, 12th May, 1896.

Where a claim is disputed, an action asking a declaration of the right to rank, is an action

for equitable relief, and, as such, could not, before the amendment of 1896, be entertained by the County Court: Whidden v. Jackson, 18 A. R. 439. By 59 V. c. 19, s. 3 (14), it is provided, however, that the County Court shall have jurisdiction in "every action or contestation to establish the right of a creditor to rank upon an insolvent estate where the amount of such claim does not exceed $400."

If a limited guarantee is given for an ultimate balance, the surety can rank upon the estate, but subject to the prior rights of the guaranteed creditor, who is entitled to payment in full, and is even after payment by the surety entitled to rank for the full original amount of the debt. If, however, the surety pays the amount of the guaranty before the creditor proves his claim the creditor must give credit for the sum received, and can prove only for the balance, while the surety ranks for the amount paid by him: Martin v. McMullen, 18 A. R. 559; Bardwell v. Lydall, 7 Bing. 489; Thornton v. McKewan, 1 H. & M. 525. If it is a guaranty for a specific portion of the debt, the surety upon payment is entitled to rank and the creditor's claim must be reduced. One surety paying the full amount of the debt and obtaining an assignment thereof is entitled to rank against the estate of his co-surety for the full amount paid, though he is not entitled to receive more than the proper proportion of the full amount of the debt: In re Parker, Morgan v. Hill, [1894] 3 Ch. 400.

The Act respecting Trustees and Executors, R. S. O. (1887) c. 110, s. 36, provides as follows:

"Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such or the like notices as in the opinion of the Court in which such trustee, assignee, executor, or administrator is sought to be charged, would have been given by the High Court in an action for the execution of the trusts of such deed or assignment, or an administration suit (as the case may be), for creditors and others, to send into (sic) such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate, (as the case may be), the trustee, assignee, executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate, or the assets of the testator or intestate (as the case may be), or any part thereof amongst the parties entitled thereto, having regard to the claims of which the trustee, assignee, executor or administrator has then notice, and shall not be liable for the proceeds of the trust estate, or assets (as the case may be), or any part thereof, so dis-

tributed to any person of whose claim the trustee, assignee, executor or administrator had not notice at the time of the distribution thereof or a part thereof (as the case may be); but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets (as the case may be), or any part thereof, into the hands of the person or persons who may have received the same respectively."

It is entirely optional with the assignee to give this notice or not, and the nature of the notice depends very much upon the locality and nature of the business: In re Bracken, Doughty v. Townson, 43 Ch. D. 1. It is always better to give it, however, as liability for unknown claims is then guarded against. The notice under section 12 is a compulsory notice, and must be published in the Ontario Gazette, while this notice need not: Re Cameron, Mason v. Cameron, 15 P. R. 272, but the two may, with advantage, be combined, and it is well to publish the combined notice for at least four weeks in the Ontario Gazette, and for the same time (one insertion a week) in some paper or papers having a general circulation in the locality or localities where claimants are likely to be.

Although the assignee is protected if proper notice is given by him, it would seem that an unpaid creditor has a right to make those creditors who have received a share of the estate make up enough to put him on an equal

ity with them. This is a settled principle in the distribution of the estate of a deceased person, and the statutory provision for ratable distribution in that case is in effect the same as the provisions of an assignment under this Act: Doner v. Ross, 19 Gr. 229; Bank of British North America v. Mallory, 17 Gr. 102; Chamberlen v. Clark, 9 A. R. 273; and see R. S. O. (1887) c. 119, s. 36. This is an equitable right, however, and may be barred by lapse of time or acquiescence: Blake v. Gale, 31 Ch. D. 196. If a payment is proper at the time it is made, but owing to a subsequent unexpected depreciation in value the estate cannot pay other beneficiaries at the same rate, payments of the excess will not be ordered: In re Winslow, Frere v. Winslow, 45 Ch. D. 249; Todd v. Studholme, 3 K. & J. 324.

The following form of notice is sufficient:

NOTICE TO CREDITORS.

In the matter of

Notice is hereby given that of the of in the county of , carrying on business as at the said of , has made an assignment under R. S. O. 1887, c. 124, and amending Acts, of all his estate, credits and effects to , of the of , for the general benefit of his creditors.

A meeting of his creditors will be held at the office of , in the of on day, the 189 , at the hour of o'clock in the noon, to receive a statement of affairs, to appoint inspectors and fix their remuneration, and for the ordering of the affairs of the estate generally.

Creditors are requested to file their claims with the assignee, with the proofs and particulars thereof required by the said Acts, on or before the day of such meeting.

And notice is further given, that after the day of , 189 , the assignee will proceed to distribute the assets of the debtor amongst the parties entitled thereto, having regard only to the claims of which notice shall then have been given, and that he will not be liable for the assets, or any part thereof, so distributed to any person or persons of whose claim he shall not then have had notice.

Assignee.

The following form of Contestation of Claim may be used:

IN THE MATTER OF AN ACT RESPECTING ASSIGNMENTS AND PREFERENCES BY INSOLVENT PERSONS, R. S. O. (1887), CHAPTER 124, AND AMENDING ACTS.

And in the matter of the estate of

To

You are hereby notified, pursuant to the provisions of the above Act and under the authority and direction of the Creditors and

Inspectors of this estate, that I dispute your right to rank on the estate of the above named insolvent for $, the amount of your claim filed with me, or for any part thereof.

And you are hereby further notified that unless within thirty days after the receipt by you of this notice, or within such further time as may be allowed on application to the proper Judge in that behalf, an action is brought against me to establish said claim and within the same time a copy of the writ or process is served upon me or my solicitor herein named, your claim to rank upon the estate shall be forever barred.

And you are hereby further notified that service of any writ or process to enforce said claim may be made upon my solicitor, A. B., of, etc.

Dated at the day of

Assignee.

Clauses 5 (b) to 5 (g) were added by 59 V. c. 31, s. 4, and give the debtor an opportunity of protecting himself from improper claims.

Clauses 6 (1) and 6 (2) were added by 59 V. c. 31, s. 6, and enable the assignee, if he see fit to do so, to adopt the contestation procedure of Creditors' Relief Act, the sections in question being as follows:

32. Where the money levied is insufficient to pay all claims in full, and the time has come for distributing the money levied, the

sheriff may forthwith distribute the same as directed by this Act; or he may first prepare for examination by the debtor and his creditors a list of the creditors entitled to share in the distribution of the amount levied, with the amount due to each for principal, interest and costs; the list to be arranged so as, among other things, to shew the amount going to each creditor under the provisions of this Act, and the total amount to be distributed; and the sheriff may deliver, or send (prepaid and registered) by post to each creditor or his solicitor, a copy of the list, with the several particulars aforesaid; and in such case the further proceedings may be as follows:

(1) If within eight days after all the said copies have been delivered or posted, or within any further time the Judge may allow, no objection is made as provided by this Act, the sheriff shall make distribution forthwith pursuant to such list;

(2) In case an objection is made as provided by this Act, the sheriff shall forthwith distribute such an amount of the money made, and to such persons pari passu, as may not interfere with the effect of the objection in case the same should be allowed;

(3) The sheriff may disregard objections which are frivolous, or manifestly insufficient to interfere with the distribution proposed, and distribute as if such objections had not been made;

(4) Any person prejudiced by the proposed scheme of distribution, may contest the same in manner following, viz., by giving a notice in writing to the sheriff, stating therein distinctly his objection to the scheme (or any part thereof) and the grounds of objection, and by, at the same time, delivering to the sheriff an affidavit of previous service of a copy of the notice on the debtor and the creditors interested in resisting the objection, unless the Judge shall by order have dispensed with the service, or on affidavit of service as the Judge shall have sanctioned;

(5) The contestants shall, within eight days thereafter, apply (upon notice) to the Judge for an order adjudicating upon the matter in dispute; and otherwise the contestation shall be taken to be abandoned. The notice may be in the Form G. in the schedule hereto;

(6) The Judge may determine any question in dispute in a summary manner, or may direct an issue or action for the trial thereof, either by a jury or otherwise and in any Court or county, and may make such order as to the costs of the proceedings as may be just. This sub-section is subject to the same provisions as are set forth in sub-section 2 of section 11 of this Act;

[Subsection 2 of section 11 provides that if a contestation is not being carried on in good faith another creditor may intervene.]

(7) In the event of a claimant under a contestation being held not entitled, or only entitled to part of his claim, the money retained pending the contestation, or the portion as to which the claimant shall have failed, shall be distributed among the execution creditors and other creditors who would have been entitled thereto, as the same would have been distributed had the claim in respect thereof not been made.

33. In case several creditors are interested in a contestation, either for or against the same, the Judge shall have authority to give, and shall give, such directions for saving the expense of an unnecessary number of parties and trials, and of unnecessary proceedings, as may be just, and he shall direct by whom and in what propotions any costs incurred in the contestation, or in any proceedings thereunder, shall be paid; and whether any and what costs shall be paid out of the money levied.

Form G. is as follows:

In the County Court of the County of

A. B., Claimant,
v.
C. D., Debtor.

To F. G. and M. N., claimants of moneys levied by the sheriff of the county of out of the estate of C. D.

Take notice that I will on the day of next, apply to the Judge of the County Court of the county of at his chambers at the court house in the town of for an order adjudicating upon the right of you the said to rank upon the said moneys for any amount whatever (or as the case may be); and further take notice that I will, upon the said application, read the affidavits of E. F. and X. Y., filed with the clerk of the Court.

21. Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period and afterwards from time to time at intervals of not more than three months, the assignee shall prepare and keep constantly accessible to the creditors accounts and statements of his doings as such assignee, and of the position of the estate; and he shall declare dividends of the estate whenever the amount of money in his hands will justify a division thereof, and also whenever he is required by the inspectors. 49 V. c. 25, s. 6.

(2) As large a dividend as can with safety be paid, shall be paid by every assignee under the said Act within twelve months from the date of any assignment made under the said Act, and earlier if required by the inspectors; and thereafter a further dividend shall be paid every six months, and more frequently if required by the inspectors, until the estate is wound up and disposed of. 59 V. c. 31, s. 5.

It is the duty of an assignee to at all times have his accounts ready, to afford all reasonable facilities for their inspection and examination, and to give full information whenever required, and if a creditor lives at a distance he should if required give this information by letter, and should also, at the creditor's expense, furnish copies of any accounts that may be asked for: Sandford v. Porter, 16 A. R. 565.

The assignee may choose his own solicitor: In re Lamb, 17 C. P. 173; but this solicitor's bill of costs may be taxed by any of the creditors: Sandford v. Porter, 16 A. R. 565. The assignee must be careful not to make himself personally responsible to the solicitor for the estate: Butterfield v. Wells, 4 O. R. 168.

In the absence of special difficulties the estate should be wound up within a year: Ontario Bank v. Lamont, 6 O. R. 147.

Undeclared dividends may be attached: Parker v. Howe, 12 P. R. 351.

The creditor may take the dividends and then sue the debtor for the balance of the claim: Mackenzie v. Blackburn, Common Pleas Division. 12th February, 1890.

22. So soon as a dividend sheet is prepared, notice thereof shall be given by letter posted to each creditor, enclosing an abstract of receipts and disbursements, showing what interest has been received by him for moneys in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and after the expiry of eight days from the day of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid. 49 V. c. 25, s. 7.

The receipt of a dividend does not deprive a creditor of the right to call the assignee to account, and to make him responsible for profit alleged to have been made by him at the expense of the trust estate: Morrison v. Watts, 19 A. R. 622; Beemer v. Oliver, 10 A. R. 656; but conduct directly conducing to the transaction afterwards attempted to be complained of will be a bar: Miller v. Hamlin, 2 O. R. 103.

It is doubtful how far a claim that has before the assignment passed into judgment can be objected to by other creditors. It was held in In re Hague, Traders Bank v. Murray, 13 O. R. 727, that creditors could not defeat a judgment creditor's claim by showing that the note in respect of which the judgment had been obtained against the deceased as endorser had not been protested. In that case, however, there was nothing in the nature of fraud, and it was an attempt to take advantage of a technicality. In the Imperial Bankruptcy Act special provision is made for attacking judgments, and this seems to be merely a statutory recognition of an equitable doctrine that would apply to an administration under this Act, so that if fraudulently obtained a judgment would be open to objection: In re Hawkins, [1895] 1 Q. B. 404; Ex parte Lennox, 16 Q. B. D. 315; Ex parte Banner, 17 Ch. D. 480; Ex parte Kibble, L. R. 10 Ch. 373; McDonald v. Boice, 12 Gr. 48; Bowerman v. Phillips, 15 A. R. 679. If a judgment

is obtained after the assignment against the assignor for an alleged pre-existing indebtedness it is not even prima facie evidence against the assignee: Stewart v. Gage, 13 O. R. 458.

It has been held that an administrator, in the absence of objection by a creditor, is not bound to set up the defence of the Statute of Limitations, but the objection can be taken by one creditor against another in administration proceedings, and the administrator cannot waive the defence after objection. The doctrine would apply to an assignee, who should, therefore, set up the defence if open to him: In re Wenham, Hunt v. Wenham, [1892] 3 Ch. 59; Budgett v. Budgett, [1895] 1 Ch. 202; Midgley v. Midgley, [1893] 3 Ch. 282; Alston v. Trollope, L. R. 2 Eq. 205; Jardine v. Wood, 19 Gr. 617; Re Ross, 29 Gr. 385. There is no right under any circumstances to waive the defence of the Statute of Frauds: In re Rownson, Field v. White, 29 Ch. D. 358.

23. The law of set-off shall apply to all claims made against the estate and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plaintiff or

defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this or any other Act respecting frauds or fraudulent preferences. 48 V. c. 26, s. 20.

This section is the same in effect as section 107 of the Insolvent Act of 1875, which has been given a liberal construction: Mason v. Macdonald, 45 U. C. R. 113; Court v. Holland, 29 Gr. 19. The subject of set-off is too large to be dealt with here. The main principle is that the claims to be set off must be payable by and owing to a person in the same capacity; thus a debt due by an individual partner cannot be set off against a claim by a partnership estate: Graham v. Toms, 25 Gr. 184. Making an assignment for the benefit of creditors after a verdict for damages has been rendered in favour of the assignor does not prevent the defendant from setting off a debt due by the assignor: Moody v. Canadian Bank of Commerce, 14 P. R. 258; and a purchaser of a stock-in-trade may set off against the price the full amount of claims against the vendor bought up by him at a discount before the vendor's assignment for the benefit of creditors: Thibaudeau v. Garland, 27 O. R. 391.

A chattel mortgagee is entitled to set-off as against the mortgagor's assignee surplus proceeds of sale of the mortgaged goods, and if this is not done in pursuance of any agreement between the mortgagor and mortgagee the transaction is not a preference: Stephens v. Boisseau, 23 A. R. 230.

As to allowance of commision on accounts set off, see In re Central Bank, Lye's Claim, 22 O. R. 247.

Costs of taxation payable to an assignee who taxes a solicitor's bill for services rendered to the insolvent cannot be set-off against the solicitor's claim: In re Rogers and Farewell, 14 P. R. 38.

24. Any affidavit authorized, or required, under this Act may be sworn before any person authorized to administer affidavits in the High Court, or before a Justice of the Peace, or, if sworn out of Ontario, before a Notary Public. 48 V. c. 26, s. 21.

Probably "person authorized to take affidavits" is intended: R. S. O. (1887) c. 62.

25. (1) Where there has been an assignment for the benefit of creditors the

assignee, or assignees, upon resolution passed by a majority vote of the creditors present or represented at a regularly called meeting of the creditors of the assignor or upon the written request or resolution of the majority of the inspectors of the estate may without an order examine the assignor, or any person who is or has been an agent, clerk, servant, officer or employee of any kind of the assignor, upon oath before a master or local master, or an examiner, or before one of the registrars, deputy clerks of the Crown, or before the Judge of the County Court of the county within which such assignor resides, or before any official referee or may by the order of the Court or a Judge examine the assignor on oath before any other person to be specially named in such order, touching the estate and effects of the assignor, and as to the property and means he had when the earliest of the debts or liabilities of the assignor existing at the date of the as-

signment was incurred, and as to the property and means he still has of discharging his debts and liabilities, and as to the disposal he has made of any property since contracting such debt or incurring such liability and as to any and what debts are owing to him.

(2) Any person liable to be examined under this Act may be compelled to attend and testify and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness in an action in the High Court of Justice.

(3) Any person liable to be examined under this Act may be served with an appointment signed by the Judge or officer, or a copy thereof, and where the examination is to take place under an order, also with a copy of the order; such service

to be made at least 48 hours before the time appointed for the examination; and the person to be examined is to be paid the same fees as a witness.

(4) The examination shall be conducted in the same manner as in case of an oral examination of an opposite party.

(5) In case such assignor does not attend as required by the said appointment, or appointment and order, as the case may be, and does not allege a sufficient excuse for not attending, or if attending, refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such assignor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Court or Judge may order the assignor to be committed to the common gaol of the county in which he

resides, for any term not exceeding twelve months.

(6) The rules and procedure from time to time in force in the High Court of Justice for the examination of judgment debtors shall, as far as may be, apply to an examination under this Act in all respects as if the assignor were a judgment debtor.

Section 25 was added by 58 V. c. 23, and was amended by 59 V. c. 31, s. 9, and by the latter Act section 26 was added. The practice as to examinations will be found in Holmsted and Langton, p. 734, et seq.

26. (1) In case any person has or is believed or suspected to have in his possession or power any book, document, or paper of any kind relating in whole or in part to the debtor, his dealings or property, such person may, upon resolution passed by a majority vote of the creditors present or represented at a regularly called meeting of the creditors of the assignor exclusive of such person (if he is a cred-

itor) or upon the written request or resolution of the majority of the inspectors of the estate, be required by the assignee to produce such statement or statements for the information of such assignee.

(2) In case such person fails to produce the said book, document or other paper within four days of his being served with a copy of the said resolution and a request of the assignee in that behalf, or in case the assignee or the majority of the inspectors is or are not satisfied that full production has been made, the assignee may without an order examine the said person before any of the officers mentioned in the preceding section touching any book document or other paper which he is supposed to have received.

(3) Any such person may be compelled to attend and testify, and to produce upon his examination any book, document or other paper which under this section he

is liable to produce in the same manner and subject to the same rules of examination and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined as in the case of a witness in an action in the High Court of Justice.

COMPOSITION AGREEMENTS.

It very frequently happens that after an assignment for the benefit of creditors has been made a composition is arranged, and it may be useful to mention a few of the authorities relating to composition agreements. The most important point to be borne in mind is that all creditors must be dealt with on an equality, and that any advantage or bonus to any creditor to induce him to assent to the agreement will make the agreement void: Dauglish v. Tennent, L. R. 2 Q. B. 49. A general discussion of the subject will be found in Addison's Law of Contracts, 9th ed., p. 82; Kerr on Fraud, 2nd ed., p. 231, et seq.; and Forsyth on Composition, p. 104, et seq. The doctrine is very far-reaching. Any promise made by the debtor or any person on his behalf, to pay the creditor more than the other creditors are to receive, cannot be en-

forced, and not to disclose is to conceal: McKewan v. Sanderson, L. R. 20 Eq. 65; Knight v. Hunt, 5 Bing. 432; Ex parte Milner, 15 Q. B. D. 605.

Nor can the creditor recover upon a negotiable instrument or other security given by the debtor or any person on his behalf to the creditor for the amount agreed to be paid: McKewan v. Sanderson, L. R. 20 Eq. 65; Leicester v. Rose, 4 East 372.

If such a negotiable instrument or security is transferred to a bona fide holder for value, and payment enforced by him, the debtor can recover back the amount from the creditor. The doctrine of par delictum does not apply; it is oppression on the one side and submission on the other: Smith v. Cuff, 6 M. & S. 160; Horton v. Riley, 11 M. & W. 492; Alsager v. Spalding, 4 Bing. N. C. 407; and the debtor may even recover back money paid to the creditor before he signs: In re Lenzberg's Policy, 7 Ch. D. 650; Atkinson v. Denby, 6 H. & N. 778; 7 H. & N. 934; or set-off such payments against future indebtedness: Ex parte Minton, 1 M. & A. 440; 3 D. & C. 688.

It matters not whether the preferred creditor signs first or last; the result is the same and the agreement is avoided: Ex parte Milner, 15 Q. B. D. 605; and the penalty is that the preferred creditor cannot recover even the same amount as the other creditors,

but loses both the ordinary composition payment and the secret advantage: Howden v. Haigh, 11 A. & E. 1033; 3 P. & D. 661; Ex parte Phillips, 36 W. R. 567; and cannot even claim on the original indebtedness, at any rate not till all other creditors have been paid in full: In re Cross, 4 DeG. & Sm. 364; Ex parte Oliver, 4 DeG. & Sm. 354. But this doctrine does not apply if the creditor has not executed a release and default is made in payment of the composition: Weese v. Banfield, 22 A. R. 489. Notes or securities given in substitution for or renewal of a note originally given to cover a secret advantage of this kind are tainted by the original fraud and cannot be enforced: Geere v. Mare, 2 H. & C. 339.

One creditor cannot, without the knowledge and consent of the other creditors, obtain a bonus or increased payment in consideration of securing to the other creditors payment of the composition, for the other creditors are entitled to exercise the option of foregoing the guarantee and taking a larger composition payment instead: Wood v. Barker, L. R. 1 Eq. 139; though in our own Courts an agreement of this kind has been more leniently looked at: Re Russell, 7 A. R. 777.

The doctrine is not limited to agreements to give the preferred creditor a larger sum than the other creditors. Security secretly given to one creditor to secure the composi-

tion payment is void: Leicester v. Rose, 4 East 372; and such a secret agreement effects a release of a guarantor of the composition payment: Pendlebury v. Walker, 4 Y. & C. Exch. 424; Clarke v. Ritchey, 11 Gr. 499.

Payment of a creditor's costs as an inducement to sign has been held to invalidate a composition deed under the Insolvent Act: In re McRae, 1 A. R. 387.

If, however, each creditor is standing on his own rights, and there is no mutual reliance, each may make his own bargain: In re McHenry, [1894] 2 Ch. 428; [1894] 3 Ch. 365; and there is no necessity for disclosing the fact that a creditor already holds security; a general reservation of rights in respect of existing securities is sufficient: Henderson v. Macdonald, 20 Gr. 334; and a composition agreement is not invalidated where one claim is paid in full, that claim being to the knowledge of all the creditors in suit, and the payment being made under pressure of this suit: Carey v. Barrett, 4 C. P. D. 379.

It is usual to insert in composition agreements a provision that on default of punctual payment, the original claims shall revive, credit being given for any payments made on account. But this is an implied condition of such an agreement: Ex parte Bennett, 2 Atk. 527; Ex parte Vere, 19 Ves. 93; Andrews v. Bank of Toronto, 15 O. R. 648; In re Hatton,

L. R. 7 Ch. 723; Weese v. Banfield, 22 A. R. 489; and applies even where there is a surety: Ex parte Gilbey, 8 Ch. D. 248; unless the intention to substitute the composition payments for the original debt is clearly shown: Ex parte Hernaman, 12 Jur. 643. Such a condition is not a penalty so far as the original debtors are concerned, but is a penalty and cannot be enforced against third persons: Watson v. Mason, 22 Gr. 180, 574; Thompson v. Hudson, L. R. 4 H. L. 1; and creditors of a new business are entitled in priority to creditors of an old business who set up that a discharge has been fraudulently obtained: Buchanan v. Smith, 17 Gr. 208; 18 Gr. 41.

It is also usual to insert a condition that the agreement shall be binding only if a certain number of creditors sign, and in the absence of such a condition each creditor who signs is bound: Norman v. Thompson, 4 Exch. 755; Carey v. Barrett, 4 C. P. D. 379. A creditor who signs is bound to the full amount of his claim: Harrhy v. Wall, 1 B. & Ald. 103; and cannot wilfully misstate the amount of his claim and afterwards sue for the balance: Britten v. Hughes, 5 Bing. 460; Holmer v. Viner, 1 Esp. 132; Fowler v. Perrin, 16 C. P. 258; Eastabrook v. Scott, 3 Ves. 456.

A false statement by the debtor that other creditors have agreed to sign if the creditor approached signs vitiates the agreement: Cooling v. Noyes, 6 T. R. 263; and so

also does any non-disclosure of assets by the debtor: Vine v. Mitchell, 1 Moo. & R. 337.

Where there is a compulsory discharge under an insolvent Act the debt remains, though it cannot be enforced, and there is consideration for a promise to pay it; but it is otherwise where there has been a voluntary release: Samuel v. Fairgrieve, 21 A. R. 418, and cases there cited. (Reversed in the Supreme Court on the question of the effect of the Bills of Exchange Act.)

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